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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LINCOLN CREDIT CO., D. H. FINANCE CORP., ACE F.S. INC., C.F.S. INC., COLONIAL CREDIT INC., and GATEWAY INVESTMENT CORP.,
Appellants,

vs.

GEORGE PEACH, as Circuit Attorney of the City of St. Louis, Missouri,

and

JOHN ASHCROFT, as Attorney General of the State of Missouri,

and

BENEFICIAL FINANCE CO. OF MISSOURI, INC., Intervenor,
Appellees.

On Appeal from the Supreme Court of Missouri

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether Missouri's statute, V.A.M.S. §408.096, the effect of which is to make it a crime for an agent of a borrower to charge or receive a fee for arranging credit for the borrower, as Appellants lawfully did prior to the statute, and to make void any promissory note evidencing such credit, while allowing the agent of a lender, under other Missouri statutes, to charge and receive a fee for arranging the same kind of credit with impunity, creates invidious discrimination through a constitutionally faulty classification, without any reasonable relationship to a legitimate state interest, thereby depriving Appellants of their liberty of contract and their property without due process of law, and denying to Appellants the equal protection of the law in violation of Amendment 14, §1 of the Constitution of the United States?

Among other Missouri statutes, V.A.M.S. §408.095 permits agents of lenders to charge and receive fees not in excess of 2% per month on outstanding amounts of loans which they arrange.

2. Whether Missouri's statute, V.A.M.S. §408.096, which makes it a crime to impose or receive any fee, other than a fee "expressly provided for by statute, for arranging credit in the amount of $1,000.00 or less the proceeds of which are intended to be used by the borrower primarily for personal, family, or household purposes", is so vague and uncertain as to make its application to Appellants constitute a violation of Amendment 14, §1 of the Constitution of the United States by depriving Appellants of their liberty of contract and their property without due process of law, when the prohibited "arranging credit" requires a determination by Appellants in each credit transaction of what fees are for "arranging" credit, what other statutes contain fees "expressly provided for by statute," and a determination of what "credit" is "intended to be used by the borrower primarily for personal, family, or household purposes"?

3. Whether the Missouri summary judgment procedure has been interpreted and applied by the Missouri Supreme Court in such a manner as to deny to Appellants an opportunity to be heard at a meaningful time and in a meaningful manner on material issues in this case, in violation of the due process and equal protection clauses of Amendment 14, §1 of the Constitution of the United States, particularly by the action of the Missouri Supreme Court in (1) adopting as fact the Appellees' theory of the state interest underlying the enactment of V.A.M.S. §408.096, when such theory is not supported by anything in the Record on Appeal and thus, under Missouri case precedent, is not entitled to be taken into consideration on appeal; (2) applying a Missouri vagueness test for non-criminal statutes instead of the applicable Federal test for criminal statutes, as briefed by Appellants; and (3) refusing to consider, or ignoring two issues briefed by Appellants, namely, the vagueness of certain statutory provisions, and the violation of substantial property interests of Appellants arising under Article 3, §44 of the Missouri Constitution of 1945 which requires that "rates of interest fixed by law shall be applicable generally and to all lenders without regard to the type or classification of their business?"

These court actions first appeared in the Opinion of the Missouri Supreme Court, which affirmed the summary judgment of the trial court upholding the validity of V.A.M.S. §408.096 on all involved issues of constitutional law, in opposition to Appellants' Motion for Summary Judgment to declare said statute unconstitutional. These actions were immediately challenged, in Appellants' Motion for Rehearing, as violating Appellants' due process and equal protection rights under Amendment 14, §1 of the Constitution of the United States.

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LINCOLN CREDIT CO., D. H. FINANCE CORP., ACE F.S. INC., C.F.S. INC., COLONIAL CREDIT INC., and GATEWAY INVESTMENT CORP.,
Appellants,

vs.

GEORGE PEACH, as Circuit Attorney of the City of St. Louis, Missouri,

and

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BENEFICIAL FINANCE CO. OF MISSOURI, INC., Intervenor,
Appellees.

On Appeal from the Supreme Court of Missouri

JURISDICTIONAL STATEMENT

OPINIONS BELOW

This appeal is from an Opinion of the Supreme Court of Missouri, En Banc, filed on July 6, 1982. The Opinion is reported at 636 S.W.2d 31, and appears in the Appendix hereto at Page A-1 thereof. Appellants' Motion for Rehearing, which appears in the Appendix at page A-20 thereof, was filed on July 21, 1982, (see Appendix, Page A-35 thereof), and was denied on August 2, 1982, by an order which appears in the Appendix at Page A-36 thereof.

The Opinion of the Supreme Court of Missouri, affirming the judgment of the trial court, was on an appeal by the plaintiffs from a summary judgment of March 16, 1981, appearing in the Appendix at Page A-16 thereof, as amended by an order of April 2, 1981, appearing in the Appendix at Page A-19 thereof, granted by the Circuit Court of Missouri, Twenty-Second Judicial Circuit, Division 3, by the Honorable MURRAY L. RANDALL, Judge, in response to a Motion for Summary Judgment filed by plaintiffs on October 24, 1980.

JURISDICTIONAL GROUNDS

The Opinion of the Supreme Court of Missouri, filed on July 6, 1982, affirmed a summary judgment upholding V.A.M.S. §408.096 as being valid under the Constitution of the United States. Appellants' Petition sought a declaratory judgment that said statute was unconstitutional under the due process clause and the equal protection clause of Amendment 14, §1 of the Constitution of the United States, and an injunction against its enforcement. Appellants' Motion for Rehearing was filed on July 21, 1982, within fifteen days after the filing of the Opinion, as required by V.A.M.R. 84.17. The Motion for Rehearing raised additional due process and equal protection issues of Federal constitutional law based upon the Missouri Supreme Court's deviation from Missouri case precedent, disregard of Federal case precedent, and failure and refusal to consider material issues covered by appellate briefs. On August 2, 1982, the Motion for Rehearing was denied.

On September 1, 1982, Appellants' Notice of Appeal to the Supreme Court of the United States, together with proof of service of said notice, was filed with the Clerk of the Supreme Court of Missouri, as appears in the appendix at Page A-37 thereof, and also with the Clerk of the Ciruict Court of Missouri, Twenty-Second Judicial Circuit, as appears in the Appendix at Page A-41 thereof, all as required by the Supreme Court Rule 10.

The jurisdiction of this appeal is based upon 28 U.S.C.A. §1257(2). See *Hicks* v. *Miranda*, 422 U.S. 332, 343-344, 95 S.Ct. 2281, 45 L.Ed.2d 223, 236 (1975); *Lathrop* v. *Donohue, 367 U.S. 820, 824-827, 81 S.Ct. 1826, 6 L.Ed.2d 1191, 1194-1196 (1961)*, and *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 79-80, 100 S.Ct. 2035, 64 L.Ed.2d 741, 751 (1980). This appeal and the docketing of this case are being effected within ninety days following August 2, 1982, the date of denial of Appellants' timely filed Motion for Rehearing, as required by Supreme Court Rules 11 and 12.

CONSTITUTIONAL PROVISIONS, STATE STATUTES, AND PROCEDURAL RULES INVOLVED

This case involves the validity of V.A.M.S. §408.096 under Amendment 14 §1 of the Constitution of the United States, which states:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The validity of V.A.M.S. §408.096 under the foregoing provisions of the Constitution of the United States also involves the rights established by Article 3, §44 of the Missouri Constitution of 1945, which states:

> "No law shall be valid fixing rates of interest or return for the loan of use of money, or the service or other charges made or imposed in connection therewith, for any particular group or class engaged in lending money. The

rates of interest fixed by law shall be applicable generally and to all lenders without regard to the type or classification of their business."

The statute whose constitutionality is at issue, namely V.A.M.S. §408.096, states:

> "*408.096.* No person, firm or corporation shall receive or impose any fee or charge, other than one expressly provided for by statute, for arranging credit in the amount of one thousand dollars or less the proceeds of which are intended to be used by the borrower primarily for personal, family or household purposes. Any contract evidencing such excess fee or charge and any note evidencing credit so arranged is void. Any person, firm or corporation who receives or imposes a fee or charge prohibited by this section is guilty of a class B misdemeanor."

The effect of V.A.M.S. §408.096 is significantly influenced by V.A.M.S. §408.095, which states:

> "*408.095.* Every person or persons, company, corporation or firm, and every agent of any person, persons, company, corporation or firm, who shall take or receive, or agree to take or receive, directly or indirectly, by means of commissions or brokerage charges, or otherwise, for the forbearance or use of money or other commodities, any interest at a rate greater than two percent per month, except as permitted by the laws of this state, shall be deemed guilty of a misdemeanor. Nothing herein contained shall be construed as authorizing a higher rate of interest than is now provided by law."

Numerous other statutes are relevant, as indicated in the Appendix at page A-45 thereof. Certain Missouri Rules of Civil Procedure of relevance also appear in the Appendix at page A-49 thereof.

STATEMENT OF THE CASE

The facts established in the trial court, as relevant here, are that each Appellant was a corporation organized under the law of Missouri, and doing business in Missouri on and before June 15, 1979, when V.A.M.S. §408.096 was enacted by the Missouri legislature. During the three years immediately preceding the filing of the Petition by Appellants, their only business involved arranging credit in amounts that were less than $1,000.00. The credit arranged by each Appellant was pursuant to a contract between each Appellant and the prospective borrower who employed the particular Appellant to act as agent for the borrower to negotiate a loan for the borrower from a third party lender, in return for the payment of a fee to the particular Appellant. The fee to each Appellant also covered a guarantee by the particular Appellant of the borrower's obligation to the third party lender. The transactions handled by each Appellant were held by the trial court to come under the prohibitions of V.A.M.S. §408.096, which became effective on September 28, 1979. Thus, the business previously carried on by each Appellant prior to the effective date of the statute would not be lawful after the effective date of the statute, if the statute is valid.

The Petition, filed by Appellants on September 7, 1979, in the Circuit Court of Missouri, Twenty-Second Judicial Circuit as Case No. 794-0267, was against Appellees George Peach, as Circuit Attorney of the City of St. Loius, Missouri, and John Ashcroft, as Attorney General of the State of Missouri. It sought a declaratory judgment that V.A.M.S. §408.096, adopted on June 15, 1979, by the Missouri 80th General Assembly, First Regular Session, as part of a Bill containing many other statutory sections, and approved by the Governor on July 3, 1979, was invalid, null and void by reason of violating various provisions of the Missouri Constitution of 1945 and of the Constitution of the United States, and a tem-

porary restraining order and a permanent injunction against the aforesaid Appellees to prevent enforcement of said statute.

A restraining order was issued on September 7, 1979, and was continued in effect, by various court orders, throughout proceedings in the trial court and until the decision of the Missouri Supreme Court.

A motion to intervene as a defendant was filed in the trial court September 26, 1979, by Appellee Beneficial Finance Co. of Missouri, Inc., which motion was sustained on October 5, 1979.

After various discovery procedures had been carried out in the trial court, on October 24, 1980, Appellants filed their Motion for Summary Judgment, asserting that under the uncontroverted facts and law, V.A.M.S. §408.096 was in clear violation of certian designated provisions of the Missouri Constitution of 1945 and, in certain respects, in violation of the due process and equal protection provisions of Amendment 14, §1 of the Constitution of the United States. The Motion for Summary Judgment did not deal with all issues mentioned in Appellants' Petition, but it did raise the Federal constitutional issues of whether the challenged statute deprived the Appellants of their property without due process of law and denied to Appellants the equal protection of the law, by reason of the vagueness of the statute and by reason of invidious discrimination in prohibiting Appellants' previously lawful business and making void a promissory note executed as part of a prohibited transaction while permitting other businesses to operate with impunity and permitting enforcement of a promissory note executed for credit arranged under the protection of other statutes. The invidious discrimination issue, as raised by Appellants, included a claimed violation of Article 3, §44 of the Missouri Constitution of 1945.

The Motion for Summary Judgment was argued before the trial court. On March 16, 1981, the trial court entered an order denying Appellants' Motion for Sumary Judgment, and, under V.A.M.R. 74.04(c), the court found for Appellees, decreeing that there were no genuine issues of material matters of fact or law, and that V.A.M.S. §408.096 was not in violation of *any* con stitutional provisions, Federal or State, involved in the case. Upon a motion of Appellants to modify the summary judgment decree so as to continue the amended restraining order and bond in effect pending an appeal by the Appellants, the trial court on April 2, 1981, entered an order amending the summary judgment and decree so as to permit the restraining order to remain in effect pending a decision by the Supreme Court, which order appears in the Appendix at Page A-19 thereof.

After filing a timely notice of appeal to the Missouri Supreme Court, Appellants timely filed their Brief with the Missouri Supreme Court. That Brief dealt specifically with the vagueness issues mentioned in the second Question Presented in this Jurisdictional Statement, which were encompassed by the summary judgment and decree of the trial court. Appellants' Brief also dealt specifically with the issue of how V.A.M.S. §408.096 violates Appellants' property rights under Article 3, §44 of the Missouri Constitution of 1945, which requires that rates of interest be applicable generally and to all lenders without regard to the type or classification of their business.

The Opinion of the Missouri Supreme Court, filed on July 6, 1982, affirmed the judgment of the trial court in granting summary judgment for the Appellees, thereby upholding the validity of V.A.M.S. §408.096, on *all* constitutional law issues in the case, Federal and State. In that Opinion, the Missouri Supreme court refused to consider certain portions of the vagueness issue on the ground that all said issues were not presented to the trial court, citing the cases of *School District of Kansas City* v. *Smith,* 111 S.W.2d 167 (Mo.Sup., 1937) and *Alexander* v. *Haden,* 2 Mo. 211 (1830). The Court also applied a vagueness

test for due process purposes based upon the Missouri case, *Prokopf* v. *Whaley*, 592 S.W.2d 819, 824 (Mo.Sup., 1980), that involved a non-criminal administrative order. The Missouri Supreme Court Opinion also basically ignored the substance of the issue pertaining to Article 3, §44 of the Missouri Constitution of 1945, as briefed.

The Opinion of the Missouri Supreme Court also adopted as fact the suggestion contained in the Brief of the Appellee John Ashcroft, Attorney General of the State of Missouri, that the substantial state interest that gives a constitutional basis for validity of V.A.M.S. §408.096, under the due process and equal protection provisions of Amendment 14, §1 of the Constitution of the United States, "could" be to protect the poor and uneducated in need of small personal loans from usury, outrageous fees, and other described practices. There is nothing in the Record on Appeal to the Missouri Supreme Court that supports the suggestion contained in the Brief of said Appellee.

On July 21, 1982, Appellants filed with the Missouri Supreme Court a Motion for Rehearing and Suggestions in Support thereof, with proof of service on opposing counsel.

The Motion for Rehearing, which appears in the Appendix at page A-20 thereof, raised as additional Federal due process and equal protection issues those matters described in the third Question Presented in this Jurisdictional Statement, which issues first appeared in the Opinion of the Missouri Supreme Court. On August 2, 1982, the Appellants' Motion for Rehearing was overruled, as appears in the Appendix at Page A-36 thereof.

On September 1, 1982, a Notice of Appeal to the Supreme Court of the United States was filed with the Clerk of the Supreme Court of the State of Missouri, as appears in the Appendix at Page A-37 thereof, and with the Clerk of the Circuit Court of Missouri, Twenty-Second Judicial Circuit, as appears in the Appendix at Page A-41 thereof.

SUBSTANTIAL QUESTIONS PRESENTED REQUIRING PLENARY CONSIDERATION

There are three principal reasons why the issues presented on this appeal are so substantial as to require plenary consideration, with briefs on the merits and oral argument. These reasons are as follows.

1. First, there is a substantial issue as to whether V.A.M.S. §408.096 constitutes invidious discrimination against Appellants, since its effect is to make a crime of the previously lawful business of Appellants of arranging credit as agents of borrowers, while permitting others to conduct a similar business as agents of lenders, with impunity.

The provisions of V.A.M.S. §408.096 prohibit any fees for arranging the kind of credit described in the statute, except such fees as are expressly provided in other statutes. The right of Appellants to charge a fee for arranging credit as agents of borrowers has historically always been based upon Missouri case precedent, as found in *Hansen* v. *Duvall,* 333 Mo. 59, 62 S.W.2nd 732, 736 (1933) and *State* v. *Sargent,* 256 S.W.2d 265, 269 (Mo. App., 1953), as well as several other cases. There have been no statutory provisions establishing any limits as to the amount of such fees, but there have been and are statutes establishing limits to the amounts that could be charged to borrowers by agents of lenders for arranging credit. Such limits appear in various statutes, especially in V.A.M.S. §408.095, and §408.140, as modified by §408.190.

Since the fees for arranging credit as agents of borrowers, which had been the business of Appellants, are not provided for in any other statutes, those fees are not permitted under V.A.M.S. §408.096, and promissory notes for the credit so arranged are void under V.A.M.S. §408.096. On the other hand, fees to agents of lenders for arranging credit are permitted under V.A.M.S. §408.095, and the promissory notes for credit

so arranged are valid. This destruction of Appellants' business, while preserving the similar businesses of others, poses an invidious discrimination issue under the principles of *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540, 560-563, 22 S.Ct. 431, 46 L.Ed. 679, 690-691 (1902), and is of such great substance as to justify and require plenary consideration.

The Missouri Supreme Court in this case held that V.A.M.S. §408.096 constitutes a valid classification because it "could" be based upon the substantial state interest of protecting a poor and uneducated segment of the borrowing public against excessive credit costs, as suggested by the brief of Appellee, John Ashcroft, Attorney General of the State of Missouri. There is nothing in the Record on Appeal that gives any support to that suggestion or holding. Moreover, as indicated below, there is no basis in the law for considering as fact such statements in the brief of counsel that are not supported by the Record on Appeal and are not conceded by opposing counsel.

The above holding of the Missouri Supreme Court also raises a substantial issue of whether V.A.M.S. §408.096 contains any legitimate classification, since its effect depends upon what is expressed in other statutes, which are themselves subject to periodic change. The terms of the challenged statute do not truly reveal the purpose or actual effect of the statute.

Even if such a state interest were established, it does not follow, by any logic or reason, that V.A.M.S. §408.096 has any rational or reasonable relationship to serving that state interest. Prior to enactment of V.A.M.S. §408.096, the legislative procedure for regulating the business of arranging credit was by establishing statutory rate ceilings for such fees and for interest on loans so arranged, wherever deemed appropriate, as in the various sections of V.A.M.S. Chapter 408,, and especially in V.A.M.S. §§408.095, 408.100, 408.140, and 408.190. Therefore, the usual and presumably reasonable and rational

legislative approach to protect a particular segment of the borrowing public not already protected by existing statutes would have been to enact statutes establishing appropriate limitations on fees for business transactions of the type for which there was a perceived need of regulation, rather than a total prohibition of fees, as contained in V.A.M.S. §408.096. If there was any perceived need for legislation to protect the public against excessive charges for arranging credit that was not already under statutory regulation, it clearly was because there had not been any legislation establishing a known policy on the matter, which was not the fault of Appellants.

Since the effect of V.A.M.S. §408.096 is to eliminate businesses such as Appellants, there is an issue of great substance as to whether the obvious purpose and effect of the challenged statute is to force the borrowing public that formerly used the services of Appellants to use the services of other businesses operating under other existing statutes. Indeed, considering legislative history, the obvious effect and foremost purpose of V.A.M.S. §408.096 is the elimination of competition from businesses such as Appellants, for the primary benefit of other businesses. Under the case of *Douglas* v. *Seacoast Products, Inc.*, 431 U.S. 265, 285, 97 S.Ct. 1740, 52 L.Ed.2d 304, 320 (1977), a statute whose purpose and effect is the destruction of competition is not constitutional under the due process and equal protection clauses of Amendment 14, §1 of the Constitution of the United States.

The issue here presented is of great substance in these times, because of the significant role of special interest groups in legistative lobbying for enactment of legislation affecting interest rates and fees in connection with the extension of credit, such as V.A.M.S. §408.096. The elements of the business public, such as Appellants, who are not formidable enough to be a strong political force in the legislative process therefore are relegated either to submission to such legislation as is enacted, or to challenge the statute via the judicial process.

Under *Lawrence* v. *State Tax Commission*, 286 U.S. 276, 282-283, 52 S.Ct. 556, 558, 76 L.Ed. 1102, 1107 (1932), and *Demorest* v. *City Bank Farmers Trust Co.*, 321 U.S. 36, 42, 64 S.Ct. 384, 88 L.Ed. 526, 530 (1943), the Supreme Court of the United States will examine a state court decision upholding a state law to determine whether there is a fair or substantial basis for the decision of the state court, even if the decision is based on non-Federal issues. There is no reason of substance why agents of borrowers, such as Appellants, should be denied the right to charge a fee for arranging credit for a borrower, which transaction may even involve guaranteeing the loan made by the third party lender to the borrower, while an agent of a lender is permitted, under V.A.M.S. §408.095, to charge a fee for arranging such credit, which fee is passed on as a charge against the borrower. Similar discrimination was held to be invalid in *Wallace* v. *Zinman*, 200 Cal. 585, 254 P. 946, 950-951 (1927).

2. Secondly, there is a substantial due process issue as to the vagueness of V.A.M.S. §408.096, which should be of great public concern. This statute creates a new criminal offense of receiving a fee for arranging certain kinds of credit that depends upon the meaning of very uncertain terminology. First, it is uncertain what acts constitute "arranging" credit. Does "arranging" include the guaranteeing of the loan? The Opinion of the Missouri Supreme Court leaves this issue in doubt. Secondly, the criminal offense depends upon a determination by the arranger of credit of whether the "credit" is intended to be used by the borrower primarily for personal, family, or household purposes. Third, it is uncertain what fees are prohibited, because there is no crime if the fees are expressly provided for in other statutes. However no other statutes are identified. Under V.A.M.S. §§408.095, 408.140, and 408.190, which appear relevant, other statutes become relevant, such as V.A.M.S. §367.100 and various statutes in V.A.M.S. Chapter 408, and under V.A.M.S. §367.100 statutes in V.A.M.S. Chapters 362,

364, 367, 369, 370, and 371 become relevant. Moreover, in many statutes there are cross references to other statutes that are not specifically identified.

The complexity of determining what other statutes are relevant and applicable is comparable to the issue involved in the case of *Keyishian* v. *Board of Regents of the University of the State of New York*, 385 U.S. 589, 604, 87 S.Ct. 675, 17 L.Ed.2d 629, 641 (1967), which held invalid for vagueness certain New York statutes whose meaning was complicated by the profusion of statutes and regulations, and the many cross references to interrelated statutes and rules.

As to the difficulty of determining whether the primary use intended by the borrower is for personal, family, or household purposes, the statute gives no guidelines as to how to determine the borrower's primary intended use, and there are no objective standards for determining a borrower's intent, or primary intended use. Although criminal statutes often involve determining the intent of the wrongdoer, V.A.M.S. §408.096 is different, because it makes the criminality of acts of the arranger of credit depend upon the intent of someone else. In effect, an arranger of credit may commit a crime inadvertently by making an erroneous determination of the intent of a borrower. Such an issue certainly deserves the plenary consideration of the Supreme Court of the United States.

The substantive difficulty of determining whether the primary use of a borrower is for "family" purposes is underscored by the decision in *Feely* v. *Birenbaum*, 554 S.W.2d 432, 435 (Mo.App., 1977), which indicates that there is no single definition of the word "family", and that it is a word capable of many different meanings. The substantive difficulty of determining what use is for a "household" purpose is underscored by the decision in *Cobb* v. *State Security Insurance Co.*, 576 S.W.2d 726, 738 (Mo.Sup., 1979), which declared that the word

"household" is a chameleon-like word, whose definition depends on the facts of each case.

3. Thirdly, there is a highly important issue of whether constitutional due process has been denied to Appellants by the limited scope of appellate review of the summary judgment applied by the Missouri Supreme Court in its Opinion and in its refusal of a rehearing. This issue has three facets.

First, it involves the failure or refusal of said court to apply the Federal due process consitutionality test for vagueness of a criminal statute, cited in Appellants' Brief, as declred in *Connally* v. *General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322, 328 (1926) and *Hynes* v. *Mayor and Council of Oradell*, 425 U.S. 610, 620, 96 S.Ct. 1755, 48 L.Ed.2d 243, 253 (1976). The test therein declared was whether the terms of the statute are so vague that men of common intelligence must necessarily guess at their meaning and differ as to their application. Instead of the Federal test, the Missouri Supreme Court applied the Missouri test for a non-criminal statute, as stated in *Prokopf* v. *Whaley*, 592 S.W. 2d 819, 824 (Mo.Sup., 1980). The state test was whether the words used in the statute are of common usage and understandable by persons of ordinary intelligence.

Secondly, the Missouri Supreme Court Opinion ignored two issues that were covered by Appellants' Brief, thereby resulting in a denial to the Appellants of a meaningful hearing at a meaningful time on such issues, even though such issues were pleaded in Appellants' Petition and presented to the trial court. One issue ignored by the Missouri Supreme Court was the vagueness of the term "arranging credit" in the context of the challenged statute. Instead of considering the term "credit" in reference to the statutory context of proceeds "which are intended to be used by the borrower primarily for personal, family or household purposes", as argued by Appellants, under the Motion for

Summary Judgment, the Missouri Supreme Court considered the term "arranging credit" as if standing alone. The Court based its action on the cases of *School District of Kansas City* v. *Smith,* 111 S.W.2d 167 (Mo.Sup., 1937) and *Alexander* v. *Haden,* 2 Mo. 211 (1830), on the misconception that all the areas of vagueness covered by Appellants' Brief were not presented by Appellants to the trial court. Neither of the two cases relied upon by the Missouri Supreme Court involved a summary judgment proceeding, which only went into effect in Missouri in 1960, with the adoption of V.A.M.R. 74.04.

Another issue ignored by the Missouri Supreme Court was the due process and equal protection issue briefed by Appellants pertaining to Article 3, §44 of the Missouri Constitution of 1945, which requires that rates of interest fixed by law shall be applicable generally and to all lenders without regard to the type or classification of their business. Under *Household Finance Corp.* v. *Shaffner,* 203 S.W.2d 734, 738 (Mo.Sup., 1947) and *St. Louis Teachers' Credit Union* v. *Marsh,* 585 S.W.2d 474 (Mo.Sup., 1979), this constitutional provision makes V.A.M.S. §408.096 an invalid form of discrimination, even if the classification has some reasonable basis, because the statute denies any interest on promissory notes which it declares void, while allowing interest on similar promissory notes that are permitted by other statutes. Since Appellants depend upon third party lenders to provide funds for loans on credit arranged by Appellants as agents of borrowers, the Appellants had a substantial consitutional right at stake in V.A.M.S. §480.096. Under the principles recognized in *Logan* v. *Zimmerman Brush Co.,* _____ U.S. _____, 102 S.Ct. 1148, 71 L.Ed.2d 265, 274-277, 279 (1982), the Missouri constitutional provision creates a substantial property right in Appellants, which cannot validly be denied under due process and equal protection clauses of Amendment 14 without an opportunity to Appellants to be heard at a meaningful time and in a meaningful manner.

The Appellants' Petition clearly indicated the integral relationship of the provisions of Article 3, §44 of the Missouri Constitution of 1945 to the due process and equal protection clauses of Amendment 14, §1 of the Constitution of the United States, in the same context as presented on the Motion for Summary Judgment. In essence, the Missouri Supreme Court deviated from its prior decisions in failing to apply the above cited provision of the Missouri Constitution of 1945 to invalidate V.A.M.S. §408.096.

The Missouri Supreme Court's refusal to consider or deal with the foregoing two issues violates the principle of *Snowden* v. *Northwest Missouri State University,* 624 S.W.2d 161, 165 (Mo.App., 1981), that review of a summary judgment is equivalent to reviewing a court tried or equity proceeding, which under V.A.M.R. 73.01(c) requires the appellate court to review the case upon both the law and the evidence as in suits of an equitable nature. Under *Murphy* v. *Carron,* 536 S.W.2d 30, 32 (Mo.Sup., 1976), such appellate review of suits of an equitable nature involves a determination of whether the decree of the trial court is supported by any substantial evidence or is against the weight of the evidence, and whether it erroneously declares the law or erroneously applies the law. In the case at bar, the Missouri Supreme Court has not applied or has erroneously applied the law in the respects indicated above. The Missouri Supreme Court also has failed to apply the rule of *Debow* v. *Higgins,* 425 S.W.2d 135, 140 (Mo.Sup., 1968), which declared that appellate review of a case tried by the court without a jury is limited to the specific matters urged on appeal.

The obvious effect and intent of the summary judgment and decree of the trial court was to rule upon all issues of law encompassed by Appellants' Petition, even though the summary judgment and decree of the trial court was granted in opposition to Appellants' Motion for Summary Judgment. If the action of the Missouri Supreme Court in ignoring the foregoing two

issues briefed by Appellants is permitted to stand, the effect would be to deny to Appellants a meaningful hearing and consideration of the particular issues of law just described. Such action would constitute the same type of action that was held to violate the due process rights of the Appellants in *Fountain* v. *Filson*, 336 U.S. 681, 682-683, 69 S.Ct. 754, 93 L.Ed. 971, 973 (1949), and in *Jaffke* v. *Dunham*, 352 U.S. 280, 281, 77 S.Ct. 307, 1 L.Ed.2d 314, 315 (1957).

Third, as mentioned under Paragraph 1 above, the Missouri Supreme Court Opinion adopted as fact certain suggestions contained in the Brief of Appellee, John Ashcroft, Attorney General of the State of Missouri, as to what could be the substantial state interest underlying enactment of V.A.M.S. §408.096. Under V.A.M.R. 81.12(b), the Record on Appeal does not include briefs and memoranda. Under principles recognized in *Rawlings* v. *Taylor*, 477 S.W.2d 737, 739 (Mo.App., 1972) and *Davis* v. *Long*, 521 S.W.2d 7, 9 (Mo.App., 1975) statements in briefs of counsel that are unsupported by the record may not be a basis for appellate review, whatever the probability of their truth, unless such statements have been conceded by opposing counsel. Counsel for Appellants have not conceded as fact the suggestion contained in the Brief of Appellee, John Ashcroft, Attorney General of the State of Missouri, and there is nothing in the Record on Appeal that indicates any such concession by counsel for Appellants.

Under the principles recognized in *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 678, 50 S.Ct. 451, 74 L.Ed. 1107, 1112 (1929) and *Great Northern Railway Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358, 366-367, 53 S.Ct. 145, 77 L.Ed. 360, 367-368 (1932), issues of Federal constitutional law that first appear in the Opinion of the State's highest court are properly subject to review by the Supreme Court of the United States if raised in a motion for rehearing in the state court, as was done in this case.

With respect to the Federal constitutional law issues mentioned above that were ignored by the Missouri Supreme Court, such issues are proper subjects for decision by the Supreme Court of the United States under the principle recognized in *Lawrence* v. *State Tax Commission*, 286 U.S. 276, 282, 52 S.Ct. 556, 76 L.Ed. 1102, 1107 (1932), that constitutional rights are denied as well by the refusal of the state court to decide the question, as by an erroneous decision of it.

CONCLUSION

For the reasons indicated above, the issues of law presented by this appeal are properly the subject of review by appeal, and probable jurisdiction should be noted. Moreover, such issues are so substantial as to require plenary consideration, with briefs and oral argument.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF MISSOURI
EN BANC

No. 63018

Lincoln Credit Co., et al.,
Appellants,

vs.

George Peach, et al.,
Respondents.

APPEAL FROM THE CIRCUIT COURT
OF THE CITY OF ST. LOUIS
Twenty-Second Judicial Circuit-Division No. 3
HONORABLE MURRY L. RANDALL, Judge

(Filed July 6, 1982)

In 1979, the Missouri General Assembly enacted § 408.096, RSMo Supp. 1979 (effective September 28, 1979). It provides as follows:

> No person, firm or corporation shall receive or impose any fee or charge, other than one expressly provided for by statute, for arranging credit in the amount of one thousand dollars or less the proceeds of which are intended to be used by the borrower primarily for personal, family or household purposes. Any contract evidencing such excess fee or charge and any note evidencing credit so arranged is void. Any person, firm or corporation who receives or imposes a fee or charge prohibited by this section is guilty of a class B misdemeanor.

On September 7, 1979, appellants filed a suit for declaratory judgment in the Circuit Court of the City of St. Louis and

sought to have § 408.096 declared void on the grounds that it violated the United States Constitution and the Missouri Constitution.

Appellants' petition stated that they were corporations duly organized under the laws of the State of Missouri for the purpose of arranging credit between a borrower and a third-party lender; that appellants receive a fee for such services; that the loan is usually evidenced by a promissory note between the borrower and the third-party lender; that the effect of § 408.096 was to make unlawful the previously lawful business conducted by appellants because they arrange only loans of $1,000 or less for personal, family or household purposes; that enforcement of § 408.096 would prohibit appellants from collecting the fee charged for arranging loans and would prohibit third-party lenders from collecting money loaned to the borrowers; and that the effect of the statute is to invalidate loans already contracted for and thus to subject appellants to suit by the third-party lenders who loaned money to appellants' clients. Appellants pleaded that § 408.096 violates provisions of the Missouri Constitution and of the United States Constitution. Appellants also requested that the court enjoin George Peach, Circuit Attorney for the City of St. Louis, and John Ashcroft, Attorney General of the State of Missouri, from prosecuting them under the statute.

On September 7, 1979, the circuit court issued a temporary restraining order against defendants Peach and Ashcroft. On September 25, 1979, October 11, 1979, and November 29, 1979, amended restraining orders were entered. On December 13, 1979, all parties consented to an order continuing the last amended restraining order until further court order.

On October 24, 1980, appellants filed a motion for summary judgment which requested the trial court to find that § 408.096 destroyed appellants' business and that it violated both the United States Constitution and the Missouri Constitution.

On March 16, 1981, the trial court entered a summary judgment denying appellants' constitutional attacks on § 408.096. The court held that the statute was not invalid or void, and declared that the temporary restraining order had expired. On March 26, 1981, appellants filed a motion to modify the summary judgment decree, declared their intent to appeal directly to this Court, and requested that the trial court stay that part of the decree which vacated the temporary restraining order pending this Court's disposition of the case. On April 21, 1981, the trial court entered an order which granted that request. Notice of appeal was then filed with this Court.

The basic test to determine whether a plaintiff has standing to bring suit for declaratory and injunctive relief is whether he has a legally protectible interest at stake. Schweig v. City of St. Louis, 569 S.W.2d 215 (Mo. App. 1978). Missouri courts have held that whether a party can lawfully engage in its business under a particular state presents a situation where that party has a legally protectible interest. State ex rel. Eagleton v. McQueen, 378 S.W.2d 449, 452 (Mo. banc 1964). Moreover, such a question constitutes a justiciable controversy under the declaratory judgment act even though no enforcement of that statute has yet been commenced against that party. *Id.*, at 452. Therefore, there is a justiciable controversy here. This Court has jurisdiction because this case involves the validity of a statute of this state. Mo. Const. Art. V, § 3.

Appellants first contend that the trial court erred in failing to declare § 408.096 unconstitutional, as applied to contracts made prior to its effective date, because the statute voids those contracts, criminally punishes appellants for receipt of payments under those contracts, and prohibits future receipt of payments due under them.

As a general rule, statutes operate prospectively. St. Louis County v. University City, 491 S.W.2d 497, 499 (Mo. banc

1973). This rule controls unless the legislative intent that they be given retroactive operation clearly appears from the express language of the act or by necessary or unavoidable implication. *Id.* However, although a statute can operate retroactively, proscriptions exist against retrospective laws, ex post facto laws, and laws that impair contract obligations. Mo. Const. Art. I, § 13; Planned Industrial Expansion Authority of the City of St. Louis v. Southwestern Bell Telephone Company, 612 S.W.2d 772, 775 (Mo. banc 1981). A retrospective law, as that term is used in the Missouri Constitution, is one which impairs existing vested civil rights. Clark v. Kansas City, St. Louis & Chicago Railroad, 219 Mo. 524, 532, 118 S.W. 40, 43 (1909). More specifically, Mo. Const. Art. I, § 13 prohibits subsequent legislation from invalidating contracts lawful at the date of their making. *See* Home Telephone Company v. Sarcoxie Light & Telephone Company, 236 Mo. 114, 132, 139 S.W. 108, 112 (banc 1911). Of course, this constitutional provision has no application in a situation where the law is enacted before the contract is entered into. *See* State v. Laurisden, 312 S.W.2d 140, 143 (Mo. 1958).

An ex post facto law is one which denounces as criminal acts which were non-criminal when committed or which changes penalties for criminal violations after such violations are committed. State ex rel. Jones v. Nolte, 350 Mo. 271, 284, 165 S.W.2d 632, 638 (banc 1942).

In our view, § 408.096 should not and cannot be applied retroactively to invalidate the loan contracts which appellants entered into prior to its effective date. First, there is no express language indicating that it should apply retroactively. Second, application of the law to invalidate the contracts made before its effective date would contravene the constitutional proscription in Mo. Const. Art. I, § 13 against retrospective laws and laws which impair contract obligations. Furthermore, such operation would constitute an ex post facto law because it would make

receipt of payments under the contracts criminal whereas when the contracts were made such receipt was not criminal.

A basic maxim of statutory construction requires that a court faced with a constitutional challenge to a statute must, if possible, construe it in favor of constitutionality. Cascio v. Beam, 594 S.W.2d 942, 946 (Mo. banc 1980). Therefore, § 408.096 must be construed to operate prospectively only. So construed, § 408.096 is not unconstitutional for the reasons first urged by appellants.

Appellants next assert that the trial court erred in not finding that § 408.096 deprives them of equal protection of the law as guaranteed by U. S. Const., Amend. 14, § 1, and Mo. Const. Art. I, § 2, and deprives them of property without due process of law as guaranteed by U. S. Const., Amend. 14, § 1, and Mo. Const. Art. I, § 1.

The substantial state interest asserted by the Attorney General to justify the enactment of § 408.096 is as follows:

> "Section 409.096 [sic] must be upheld as the Missouri legislature could have reasonably found that businesses and others engaged in the business of arranging credit frequently extort large sums from the poor and uneducated in need of small, personal loans, i.e., those least able to protect themselves from usury, outrageous fees, adhesion contracts and unconscionable bargains. Further, the legislature could have found that such businesses 'string the poor along' from payday to payday, charging outrageous sums under the guise of fees and commissions so that the borrower is forced to borrow again and again in the hope of paying off the loan, thus creating a system of perpetual indebtness [sic] and servitude. Further, the legislature could have found that the industry has for years been notoriously abusive of those in need of quick cash for personal purposes and that strong measures were needed."

In our view, "[a] rational legislature could have based its decision on such considerations." Ross v. Kansas City General Hospital and Medical Center, 608 S.W.2d 397, 399 (Mo. banc 1980). "It is enough that there is an evil at hand for correction, and that it might be thought that . . . [this] particular legislative measure was a rational way to correct it. . . . The prohibition of the Equal Protection Clause goes no further than the invidious discrimination. We cannot say that that point has been reached here." Williamson v. Lee Optical Co., 348 U.S. 483, 488, 489 (1955). We cannot invalidate the underinclusive § 408.096 as unconstitutionally arbitrary.

Appellants' next claim is that the phrase "arranging credit" in § 408.096 is an unconstitutionally vague and uncertain limitation on appellants' businesses, resulting in a deprivation of property without due process of law.

In context, the specified phrase appears as follows:

> No person, firm or corporation shall receive or impose any fee or charge, other than one expressly provided for by statute, for *arranging credit* in the amount of one thousand dollars or less . . . . (emphasis added.)

If the terms or words used in a statute are of common usage and are understandable by persons of ordinary intelligence, they satisfy the constitutional requirement as to definiteness and certainty. Prokopf v. Whaley, 592 S.W.2d 819, 824 (Mo. banc 1980). Where, however, the statutory terms are of such uncertain meaning, or so confused that the courts cannot discern with reasonable certainty what is intended, the statute is void. *Id.* On a challenge to a statute or ordinance as being unconstitutionally vague it is not necessary to determine if a situation could be imagined in which the language used might be vague or confusing but rather, the language is to be treated by applying it to the facts at hand. *Id.*

"Arrange" is defined in Webster's Third New International Dictionary (1965?, as "to put in order beforehand; make preparations for . . . ." In a statute related to § 408.096, "arranged" is defined as "to provide or offer to provide a loan which is or will be extended by another person . . . ." § 408.400(1), RSMo 1978. Although we can find no cases in which the word "arrange" has been construed by courts of this state in the context of a loan or credit transaction, as here, other courts have had such opportunities. *E.g.*, Whitlock v. Midwest Acceptance Corporation, 575 F.2d 652 (8th Cir. 1978); Manning v. Princeton Consumer Discount Company, 533 F.2d 102, 104 (3d Cir. 1976); Union Mortgage Banking & Trust Company v. Hagwood, 97 F. 360, 364 (D.S.C. 1899); Gerasta v. Hibernia National Bank, 411 F.Supp. 176, 178 (E.D. La. 1975); Thompson-Starrett Company v. Masons' Administrators, 201 S.W.2d 876, 880 (Ky. 1946). Despite their different fact patterns, these cases define "arrange" consistently with those definitions set out above.

The facts of appellants' routine business dealings with their clientele are undisputed. In their own pleadings and brief, appellants state that they meet with their clients to *arrange credit.* This involves pledging appellants' credit, in favor of the client, to a third-party lender who actually lends the money. Appellants charge a fee for their services of arranging and guaranteeing the loan. The agreement reached is usually evidenced in a written contract.

No more need be said than that the phrase "arranging credit", as employed in § 408.096, clearly encompasses appellants' acts in obtaining from third-party lenders loans for their customers. The challenged language of the statute is not unconstitutionally vague when examined in light of the facts of this case, and there is no need to attempt to resolve the statute's constitutionality under any hypothetical set of facts. *Prokopf* v. *Whaley*, 592 S.W.2d at 824. Appellants raise, in their brief,

many other allegations regarding the unconstitutional vagueness of certain other phrases in § 408.096. However, these contentions were not presented to the trial court and it has long been stated that this Court will not, on review, convict a lower court of error on an issue which was not put before it to decide. School District of Kansas City v. Smith, 111 S.W.2d 167, 168 (Mo. 1937); Alexander v. Haden, 2 Mo. 211, 212 (1830).

The trial court's finding that the statute was not unconstitutional for vagueness must be sustained.

Appellant's next several points of error hinge upon the allegation that § 408.096 is unconstitutional as a special law. They argue that because § 408.096 is a special law it violates many constitutional provisions, to wit: (1) Mo. Const. Art. XI, § 2, because it amends the corporate charter of each appellant by special law; (2) Mo. Const. Art. III, § 40(27), which prohibits regulation of trade by special law in that businesses other than appellants are not affected by the prohibitions and penalties of § 408.096; (3) Mo. Const. Art. IV, § 40(28), which prohibits any grant of special or exclusive rights, privileges, and immunities in that other businesses are unaffected by the prohibitions and penalties of § 408.096; (4) Mo. Const. Art. III, § 42, which requires thirty days notice of intention to pass a special law in that such notice was not given; (5) Mo. Const. Art. III, § 44, which prohibits any law fixing rates of interest for any particular group or class engaged in lending money; and (6) Mo. Const. Art. III, § 40(26), which prohibits any special law fixing the rate of interest.

The resolution of the assertion that § 408.096 constitutes a special law is dispositive of all the points raised.

In our view, the assertion is without merit. The statute applies uniformly to all persons, firms or corporations. As indicated *supra*, § 408.096 is not "unconstitutionally arbitrary." It is

well-established that "a law is not special if it applies to all of a given class alike and the classification is made on a reasonable basis." Ross v. Kansas City General Hospital and Medical Center, 608 S.W.2d 397, 400 (Mo. banc 1980).

Appellants next urge that the trial court erred in not finding that § 408.096 violates Mo. Const. Art. I, § 13, because it has the effect of making an irrevocable grant of special privileges and immunities to businesses other than appellants in that appellants are affected by the prohibitions and penalties of the statute while other businesses are not. They now assert that the business transactions excepted from § 408.096 are set out in "V.A.M.S. §§ 408.095, 408.140, 408.190, 408.250, 408.300, and 408.400 to 408.415."

Article I, § 13 of the Missouri Constitution provides that no law "making any irrevocable grant of special privileges or immunities, can be enacted." It has been held that the constitutional proscription applies to privileges or immunities granted to "a person or class of persons to the *exclusion of others* and in derogation of common right." State ex inf. Chaney v. West Missouri Power Co., 313 Mo. 283, 297, 281 S.W. 709, 713 (1926). As indicated *supra*, § 408.096 applies uniformly to all persons, firms or corporations. The assertion is without merit.

Appellants next urge that the trial court erred in not finding that the bill, of which § 408.096 was a part, was so amended in its passage as to change its original purpose, in violation of Mo. Const. Art. III, § 21. The constitutional provision upon which appellants rely provides in pertinent part as follows:

> Section 21. *Style of laws—bills—limitation on amendments—power of each house to originate and amend bills—reading of bills.*—No law shall be passed except by bill, and *no bill shall be so amended in its passage through either house as to change its original purpose.* Bills may

> originate in either house and may be amended or rejected by the other. (emphasis added.)

The title of the original Senate Bill 305 was as follows:

> An Act [t]o repeal sections 408.030, 408.050, 408.060, and 408.070, RSMo 1978, *relating to interest,* and to enact in lieu thereof three new sections relating to the same subject, with penalty provisions. (emphasis added.)

while the title to the Senate Bill 305 actually passed is as follows:

> An Act [t]o repeal sections 408.015, 408.020, 408.030, 408.031, 408.036, 408.052, 408.100, 408.140, 408.200, 408.220, 408.250, 408.255, 408.256, and 408.300 RSMO 1978, *relating to certain credit transactions* and to enact in lieu thereof forty new sections relating to the same subject, with penalty provisions, an effective date covering certain sections, and an emergency clause for a specific section. (emphasis added.)

Appellants' argument here is accurately stated in syllogistic fashion: (1) Mo. Const. Art. III, § 21, prohibits amending any bill through its passage in either house as to change its original purpose; (2) the original Senate Bill 305 solely concerned interest, as evidenced by its title and the statutory sections contained therein; (3) Senate Bill 305, as actually adopted, contains numerous sections which do not relate to interest at all, including § 408.096; (4) therefore, the inclusion of § 408.096 in the adopted Act violated Mo. Const. Art. III, § 21, because it related to a purpose [*i.e.,* credit transactions] different from that of the original bill [*i.e.,* interest]. Appellants also contend that the presence of § 408.096 in only the amended Act violated Mo. Const. Art. III, § 21, because its provisions were new, and concerned a subject different from that in the original bill.

Resolution of the contentions made requires comparison of the purpose of the original Senate Bill 305 and of Senate Bill 305 as actually passed.

Here, as with all challenges to the constitutionality of a statute, there must be facts pleaded in support of the attack, City of St. Louis v. Butler Co., 358 Mo. 1221, 219 S.W.2d 372 (banc 1949), and the burden of proof is on those who attack the statute. Atkins v. Department of Building Regulations, City of Springfield, 596 S.W.2d 426, 434 (Mo. 1980).

The constitutional limitation that no bill may be so amended as to change its original purpose is "designed to prevent the enactment of amendatory statutes in terms so blind that legislators themselves . . . [would be] . . . deceived in regard to their effect, and the public, from difficulty in making the necessary examination and comparison, [would fail] to become apprised of the changes in the laws." State v. Ludwig, 322 S.W.2d 841, 847 (Mo. banc 1959). "Purpose" is the key word in the provision, and it means the general purpose of the bill, not the mere details through which and by which that purpose is manifested and effectuated. Brown-Forman Distillers Corp. v. McHenry, 566 S.W.2d 194, 196 (Mo. banc 1978). The restriction is against the introduction of matter which is not germane to the object of the legislation or which bring about an extension or limitation of the scope of the bill are not prohibited; even new matter is not excluded if germane. *Id.* It is noteworthy that the title of an act, "though performing a most important function, is still not strictly a part of the act proper." State ex rel. Aull v. Field, 119, Mo. 593, 609, 24 S.W. 752, 755 (banc 1894); *see also,* Allied Mutual Insurance Co. v. Bell, 353 Mo. 891, 899, 185 S.W.2d 4, 8 (1945).

Examination of the provisions of the original Senate Bill 305 shows that it is related to a variety of aspects of the same subject matter—credit transactions. For example, sections therein concerned lawful interest rates, causes of action for excessively extracted interest (including damages, costs, and statutes of limitation), negotiability of notes, availability of usury as a defense to the enforcement of a promissory note, etc. These are not different subjects but rather are naturally related in the legislature's attempt to govern credit transactions.

The amendments made to this bill, as evidenced by the text of the finally amended bill which was passed, were not made in violation of Art. III, § 21. They, like the sections in the original bill, relate to credit transactions. The additions to the original bill do not run afoul of the constitution. Even alterations which would extend the scope of the bill are not prohibited. *Brown-Forman Distillers Corp.* v. *McHenry*, 566 S.W.2d at 196.

Nor does the change in the bill's title affect its constitutional validity. The title is not a part of the bill and so can be changed without violating Art. III, § 21. *See, State ex rel. Aull* v. *Field*, 24 S.W. at 755 (Mo. banc 1894). Appellants assert that the amended Senate Bill 305 violated Art. III, § 21, because § 408.096 and other sections do not relate to interest, as the title of the original bill indicated. A study of both bills illustrates that the purpose of both was to govern and regulate credit transactions. The title of the original bill was rightly changed to reflect the real scope of subject matter in the bill. The title of Senate Bill 305, as enacted, is accurate and constitutional.

The provisions of § 408.096 clearly relate to credit transactions and so are properly within the purpose of the bill. This puts to rest appellants' contention that the statute should not be included in Senate Bill 305 on the ground that it did not exist previously.

The trial court's finding that Mo. Const. Art. III, § 21, was not violated must be sustained.

Appellants contend that the title of Senate Bill 305 violates Mo. Const. Art. III, § 23, which provides that "[n]o bill shall contain more than one subject which shall be clearly expressed in its title . . . ." Appellants claim: (1) the bill contains more than one subject, and (2) the bill's title is in fact misleading and deceptive because it (a) gives the impression that the subject matter covered by § 408.096 was covered in previous Missouri legislation although it was not, and (b) "creates the impression that it merely relates to the regulation of certain credit transactions, and certain penalty provisions, all as covered by legislation being repealed by the bill whereas the legislation has the effect of prohibiting, not just regulating [business] [,] . . . and the legislation not only concerns penalties, but in fact creates civil and criminal liabilities for . . . [appellants] . . . which liabilities never existed under prior Missouri legislation."

The purpose of Art. III, § 23, is to ensure that the title of a bill generally indicates what the act contains so that neither the legislature nor the public is misled. State ex rel. Wagner v. St. Louis County Port Authorities, 604 S.W.2d 592, 602 (Mo. banc 1980). The title need not express the limitations in the body of the act, but where the title of an act descends to particulars and details, the act must conform to the title as thus limited by the particulars and details. Hunt v. Armour, 345 Mo. 677, 681-682, 136 S.W.2d 312, 314 (1939). The title to an act will be valid if it indicates the general contents of the act and if the contents fairly relate to and have a natural connection with the subject expressed in the title. *State ex rel. Wagner* v. *St. Louis County Port Authority,* 604 S.W.2d at 601. Mere generality of title will not prevent the act from being valid, where the title does not tend to cover up or obscure legislation which is in itself incongruous and has no necessary or proper connection with the rest of the

act. *Brown-Forman Distillers Corp.* v. *McHenry,* 566 S.W.2d at 197.

Here, as with other challenges to the constitutionality of a statute, the party on the attack has the burden to show that a constitutional provision has clearly and undoubtedly been contravened. *State* v. *Weindorf,* 361 S.W.2d at 809. In this situation appellants need to illustrate what the foreign or unrelated provisions are. *Id.* at 810. On the state of the record no proof whatsoever has been adduced to support appellants' position. Nevertheless, an attempt will be made to resolve the issues on the language of the title and content of Senate Bill 305.

A case worthy of close examination here is Edwards v. Businessmen's Assurance Co., 350 Mo. 666, 168 S.W.2d 82 (1942). There, appellants complained that an insurance act entitled "An Act to revise and amend the Insurance Laws of the State of Missouri" violated Art. IV, § 28 (now Art. III, § 23) because it included a provision on suicide and its effect on insurance coverage but the title did not mention it, and because there was no existing suicide statute to amend and therefore that provision was a new law. 168 S.W.2d at 92. Appellants argued that if "new and additional laws can be enacted by incorporating them into a bill to revise and amend existing laws, then the purpose of [Art. III, § 23] . . . may be destroyed and circumvented and new and important legislation may be enacted without notice thereof to members of the General Assembly or to the people." *Edwards* v. *Businessmen's Assurance Co.,* 168 S.W.2d at 92. The Court acknowledged that "[t]he so-called suicide statute first appeared in an act . . . entitled 'An Act to revise and amend the Insurance Laws of the State of Missouri.' " 168 S.W.2d at 92. In rejecting appellants' claim, the *Edwards* court employed the legal principles set out above to find that the title did not violate the constitution by being overbroad or misleading.

The *Edwards* case is sufficiently analogous to the instant case to be dispositive. As in *Edwards,* the title of Senate Bill 305 gives a clear idea of the substantial purpose of the act and the challenged statute is reasonably related to the rest of the bill. The fact that the title omits particular details of the act, such as what prohibitions, etc., are included, is not fatal. Moreover, the fact Missouri has never before had, as law, the specific provisions of § 408.096 does not mean that the statute violates Art. III, § 23. The provisions of § 408.096 are neither incongruous, disconnected, nor without natural relation to the rest of the bill, which relates to credit transactions. Therefore, Senate Bill 305 does not contravene Mo. Const. Art. III, § 23, as asserted by appellants.

The denial by the trial court of appellants' contention on this issue must be sustained.

In our view, § 408.096 is constitutional.

The judgment of the trial court is affirmed.

Robert T. Donnelly, Chief Justice

ALL CONCUR.

APPENDIX B

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

Cause No. 794-0267

Division No. 3

Lincoln Credit Co., et al.,
Plaintiffs,

vs.

George Peach, et al.,
Defendants.

SUMMARY JUDGMENT AND DECREE

(Filed March 16, 1981)

This matter comes before the Court on the petition of the plaintiffs for an injunction against the State enforcing Section 408.096 of an act of the 80th General Assembly of the State of Missouri, known as Senate Bill 305, which prohibits charging a fee for arranging credit in the amount of $1,000.00 or less for personal, family or household purposes, and for a declaratory judgment determining that said act is unconstitutional and invalid. An ex parte temporary restraining order was entered by the Court on September 7, 1979. Beneficial Finance Company of Missouri, Inc. was permitted to intervene on the side of the defendants.

On February 27, 1981, plaintiffs' Motion for Summary Judgment was duly called, heard and taken under submission, the parties appearing by their respective counsel. Subsequently, Suggestions of Law were filed by the parties, the last one on March 12, 1981.

The Court having been duly advised in the premises, and having duly considered the entire record, hereby makes the following findings and conclusions of law:

1. That the Court has jurisdiction over the subject matter of this action and the parties hereto.

2. That the pleadings, depositions, admissions and affidavits on file show that there is no genuine issue as to any material fact, and that the defendants are entitled to a judgment as a matter of law. Supreme Court Rule 74.04(C).

3. That the pleadings, depositions, admissions and affidavits on file show that there is no genuine issue as to the following facts: (a) that plaintiffs arrange credit for a fee, (b) in an amount of $1,000.00 or less and (c) that the proceeds from the credit are intended to be used by the borrowers primarily for personal, family or household purposes.

4. That Section 408.096 does not deny plaintiffs equal protection of the law in violation of Article 1, Section 2, Missouri Constitution or Amendment 14, Section 1, United States Constitution.

5. That Section 408.196 does not deprive plaintiffs of property without due process of law in violation of Article 1, Section 10, Missouri Constitution or Amendment 14, Section 1, United States Constitution.

6. That Section 408.096 is not an unlawful grant of special rights or privileges to others nor impairs obligations of contract, in violation of Article 1, Section 13, nor Section 28 of the Missouri Constitution, nor Article 1, Section 10 of the United States Constitution.

7. That Section 408 does not constitute an enactment of local or special law in violation of Article 3, Section 40, nor Section 44, Missouri Constitution.

8. That Section 408.096 was not enacted in violation of Article 3, Sections 20(a), 21 and 23 of the Missouri Constitution, in that it did not change the original purpose of the Bill, nor did the bill contain more than one subject matter which subject matter was clearly expressed in its title.

9. That Section 408.096 does not arbitrarily or unreasonably discriminate between different persons or classes of persons and that the Statute has a reasonable basis and purpose in its classifications of persons, conduct and groups of persons.

10. That Section 408.096 is not otherwise illegal, unlawful, invalid, unconstitutional or void.

11. That the temporary restraining order has expired. Supreme Court Rules 41.06 and 92.02(b).

Wherefore, it is hereby ordered, adjudged and decreed that said Section 408.096 is constitutional, valid, legal and of full force and effect; that judgment is hereby entered in favor of defendants and against the plaintiffs, that an injunction against the State enforcing Section 408.096 is denied, and that the temporary restraining order heretofore entered is hereby terminated.

So ordered.

/s/ Murry L. Randall, Judge of
Division No. 3 of the Circuit
Court of the City of St. Louis

APPENDIX C

In the CIRCUIT COURT City of St. Louis

Lincoln Credit Co., et al,

vs.

George Peach, et al,

No. 794-0267 Room 3 April 2, 1981

MEMORANDUM FOR CLERK

It appearing that the plaintiffs are appealing the Judgment of this Court to the Supreme Court, that part of said Judgment vacating the Temporary Restraining Order is hereby stayed pending the decision of the Supreme Court.

/s/ Murry L. Randall
Judge

APPENDIX D

IN THE SUPREME COURT OF MISSOURI
EN BANC

No. 63018

Lincoln Credit Co., et al.,
Appellants,

vs.

George Peach, et al.,
Respondents.

Motion Of Appellants For Rehearing

Come now the Appellants, LINCOLN CREDIT CO., GATEWAY INVESTMENT COMPANY, D.H. FINANCE CORP., COLONIAL CREDIT, INC., C.F.S. INC., and ACE F.S. INC., pursuant to V.A.M.R. 84.14, and for their Motion for Rehearing state:

1. The Opinion of this Court was filed on July 6, 1982. Said Opinion affirmed the actions and judgment of the trial court, the effect of which was to deny Appellants' Motion for Summary Judgment (R-163), and to declare that, under V.A.M.R. 74.04(c), the Respondents were entitled to a judgment as a matter of law (R-197), thereby declaring the provisions of V.A.M.S. §408.096 as being constitutionally valid in all respects. Said Summary Judgment was not limited to issues referred to in Appellants' Motion for Summary Judgment. Appellants respectfully submit that the Opinion of the Court has overlooked or misinterpreted several material matters of law, and material matters of fact, as shown by its Opinion, all to the prejudice of these Appellants. Such matters are as hereinafter described.

2. In denying Appellants' contentions that V.A.M.S. §408.096 deprives them of the equal protection of the law, and deprives them of property without due process of law, under the United States Constitution, Amendment 14, §1, and under the Missouri Constitution, Article I, §§1 and 2, the Court has overlooked or misinterpreted the following matters of law and fact.

First, the Court has not indicated which of the judicial tests for constitutionality, mentioned at pages 55 to 64 of Appellants' original brief, is being applied.

Second the Court overlooks the fact that its basis for finding a "substantial state interest" in the enactment of §408.096 lies in assertions made at page 26 of the Brief filed by the Attorney General, none of which assertions are a part of the Record on Appeal, within the scope of V.A.M.R. 81.14, and that under all recognized Missouri legal precedents such assertions are therefore not a proper basis for any ruling by this Court as part of the appellate review involved here.

Third, the Opinion of the Court, at page 5 thereof, merely declares that the Court "cannot invalidate the underinclusive §408.096 as unconstitutionally arbitrary." This declaration appears to interpret the equal protection and due process challenges to §408.096 as being concerned solely with the fact that the prohibitions of §408.096 apply only to certain kinds of business, but not to other kinds of business. The declaration of the Court does not recognize or deal with the constitutional requirement that §408.096 must have a rational or reasonable relationship to a legitimate state interest, and the Opinion clearly does not indicate in what manner the prohibitions of the statute can be considered to have a rational or reasonable relationship to even the public purpose which is referred to in the Brief of the Attorney General, as mentioned above. The statute does not refer to any particular class of borrowers, whether or not poor

or uneducated, nor does it apply to all credit for personal, family, or household purposes, even within the limits of $1,000.00 or less.

Fourth, the Opinion of the Court further overlooks the fact that §408.096 in itself does not establish any classification that is identifiable, either by underinclusion or overinclusion, because it arbitrarily applies to any fee or charge "other than one expressly provided for by statute", thereby leaving any classification to be accomplished by other statutes of Missouri, including not only statutes currently on the books at the time of enactment, but future amendments thereto and other future statutes. Thus, the true character and effect of V.A.M.S. §408.096 is to declare a prohibition against fees for arranging credit in a shifting and varying array of transactions, the precise scope and effect of which is not determinable by the language in §408.096, but is only deterinable by reference to unspecified other statutes, which themselves are subject to change by amendment, and to new statutes not currently enacted, which amendments and new legislation are not necessarily the product of an informed and conscious formation of policy by the Missouri General Assembly, and certainly are not the product of a conscious policy underlying §408.096, because such amendments and legislation have no relationship to, and are not contemporaneous with the enactment of §408.096. Indeed, oftentimes such amendments and legislation are the product of legislative lobbying by various interest groups that are able to prevail upon the Missouri General Assembly to adopt their views in the form of statutory enactments. The ambulatory character of statutes in Chapter 408 of the Missouri Revised Statutes governing interest charges, of which this Court can take judicial notice, is sufficient evidence of Appellants' contention in this regard.

Fifthly, §408.096 is now clearly invidious in its discrimination against Appellants, since the revision of V.A.M.S. §408.150 by House Committee Substitute for House Bills Nos. 1341, 1473, 1474 and 1475, enacted in 1982 by the 81st General Assembly, which revision now permits lenders to recover their principal. Now no Missouri statute, other than §408.096, makes void or

uncollectible the promissory note evidencing the obligation with respect to which excessive fees are charged. In all statutes other than §408.096, the civil penalty is either the return of all interest or other charges, or all excessive interest and other charges, but the principal is recoverable. Under §408.096 even the principal of the note is not recoverable. Such a distinction is unjustly and invidiously discriminatory and cannot be rationally supported, especially in light of the *Connolly* case cited at page 64, and other cases cited by Appellants at pages 64 to 76 of their original Brief.

3. In denying Appellants' claim of deprivation of property without due process of law by reason of unconstitutionally vague provisions in §408.096, Appellants submit that the Court has overlooked or misinterpreted the applicable law in several respects, and that the Opinion of theCourt reveals in itself an unconstitutional vagueness and uncertainty in the provisions of §408.096.

First, Appellants submit that the constitutional test of vagueness of §408.096 must be determined by reference to the rule applicable to criminal statutes, because §408.096 contains provisions establishing a criminal offense, as well as severe civil penalties, and that therefore the principle stated by the Court from *Prokopf* v. *Whaley*, 592 S.W.2d 819, 824 (1980), which concerned a non-criminal rule of the official Police Manual of the City of St. Louis, is not a proper statement of the legal test for constituional validity of a criminal statute, such as §408.096. The proper test of constitutional validity of a criminal statute, as stated in Appellants' original Brief, at page 80 thereof, is whether the terms of the statute are so vague that men of common intelligence must necessarly guess at the meaning of the statute and differ as to its application.

Secondly, even from the Opinion of the Court, at page 7 thereof, there is some doubt as to what is the legal effect of the

Court's distinction between a fee for services in arranging credit, as compared to the fee for guaranteeing a loan. If the fee charged for guaranteeing the loan is to be considered independently from the fee for other services in arranging credit, what is required for the distinction to be given a clear legal effect? Appellants submit that the Opinion of the Court requires clarification as to what is the legal effect, under §408.096, of a charge for guaranteeing a loan, and what services are considered as being for arranging credit so that fees for such services are to be considered as prohibited under §408.096.

Third, Appellants submit that the Court, by refusing to consider Appellants' contentions in their original brief as to the unconstitutional vagueness of certain phrases other than "arranging credit", as discussed at pages 78 to 98 of Appellants' original Brief, on the ground that such contentions were not presented to the trial court and are not subject to review here, overlooks or misinterprets the law applicable in this case to the scope of review on appeal. As indicated in paragraph 1 above, this case involves an appeal from a summary judgment entered by the trial court not in response to the Motion of Appellants for Summary Judgment, but involves a summary judgment entered by the trial court under V.A.M.R. 74.04(c) wherein the decree of the trial court sustained the constitutionality of §408.096 in all respects (R-198), declaring in paragraph 5 of the decree that §408.096 does not deprive Appellants of property without due process of law, and declaring in paragraph 10 of the decree that §408.096 "is not otherwise illegal, unlawful, invalid, unconstitutional or void."

Appellants submit that the limitations on the scope of appellate review relied upon at page 7 of the Court's Opinion, to the effect that the Court will not convict a lower court of error on an issue which was not put before it to decide, is inappropriate and inapplicable in the case at bar. Appellants submit that the scope of review on this appeal is not clearly covered by

V.A.M.R. 84.13, which is primarily concerned with review of cases tried before a jury. Appellants submit that the established scope of review on appeal of a case determined solely by the trial court, without a jury, and particularly in appeals involving summary judgments, is to review those matters that are submitted by brief on appeal, and that therefore the contentions of Appellants as to the unconstitutionality of §408.096 on grounds of vagueness are properly before this Court for appellate review.

4. At pages 7 and 8 of the Court's Opinion, the Court attempts to dispose of several challenges by Appellants to the constitutionality of §408.096 as all relating to whether that statute constitutes a special law. Appellants submit that the Court's Opinion has overlooked or misinterpreted several material matters of law that bear upon this issue.

First, the Court's conclusion that §408.096 is not a special law because it is not unconstitutionally arbitrary seems to overlook or misinterpret those material matters of law referred to above in paragraph 2 of this Motion. While the Opinion of this Court acknowledges that a law is not special if it applies to all of a given class alike, and the classification is made on a reasonable basis, for the reasons set forth in paragraph 2 above it is clear that §408.096 in itself does not establish a classification that is applicable to all of a given class, and it is equally clear that the Court has not indicated in what manner or for what reasons the provisions of §408.096 can be construed as providing a reasonable basis for any classification.

Secondly, the conclusion of the Court that there has been no violation of Article III, §44, of the Missouri Constitution of 1945, because §408.096 does not constitute a special law, is not addressing the thrust or legal effect of the cited constitutional provision. The Court overlooks and misinterprets the provisions of Article III, §44, of the Missouri Constitution of 1945 in two respects. First, the beginning sentence of Article III, §44 pro-

hibits any law fixing rates of interest that are only available to certain lenders, regardless of whether there is a reasonable basis for the classification. Obviously this prohibition is violated by §408.096. Secondly, it fails to take into consideration the last sentence of that constitutional provision, which declares, "The rates of interest fixed by law shall be applicable generally and to all lenders *without regard to the type or classification of their business.*"

Thus, the Opinion of the Court completely overlooks and ignores the contentions of Appellants as set forth at pages 125 to 135 of Appellants' original Brief. In simple terms, the notion of what constitutes a special law, for purposes of other constitutional issues, is not germane to the issue of constitutionality under Article III, §44, of the Missouri Constitution of 1945, which specifically prohibits the fixing of rates of interest that are not the same as to all lenders, irrespective of the type or classification of their business. In other words, if, for purposes of the due process and equal protection issues, there is a valid form of classification contained in §408.096, even though underinclusive, as this Court seems to suggest by its Opinion, *by that very fact* the Court must find that the provisions of §408.096 are violative of the constitutional provisions of Article III, §44, because §408.096 establishes a different rate of interest for lenders involved in transactions covered by §408.096 than the rates of interest that are allowed to lenders under other statutes of the State of Missouri, even though the transactions are similar in amount.

Appellants submit that the issues raised at pages 125 to 135 of their original Brief are proper subjects for review by this Court, for the reasons set forth in paragraph 3 above, that those issues are not addressed by the Opinion of this Court, and that those issues justify a decision favorable to Appellants, declaring unconstitutional the entire §408.096.

5. In upholding §408.096 as not constituting an irrevocable grant of special privileges or immunities that would be in violation of Article I, §13, of the Missouri Constitution of 1945, the Opinion of the Court, at page 8 thereof, relies upon the decision in *State ex inf. Chaney* v. *West Missouri Power Co.*, 313 Mo. 283, 297, 281 S.W. 709, 713 (1926), which upheld a municipal ordinance of the City of Warrensburg, Missouri, which granted to an electric utility company a non-exclusive right to use the streets of the municipality for the purposes of that utility. The Opinion of the Court cites that case as authority for the proposition that the constitutional proscription of Article I, §13, only applies to privileges or immunities granted to a person or class of persons to the exclusion of others and in derogation of common right. The ordinance upheld in the cited case was held to be a non-exclusive grant of a right to a public utility, and therefore the ordinance was valid because it did not preclude the grant of a similar right to other utilities.

The ordinance involved in the *Chaney* case is not comparable to §408.096, because §408.096 prohibits the charging of fees by persons conducting certain types of business, and prohibits the charging of interest and collection of principal on credit so arranged, while permitting the charging of fees for arranging credit by persons conducting other types of business transactions, and permitting the charging of interest and collection of principal for credit so arranged by such other businesses, all as provided in other statutes. Thus, the cited case is distinctive and not authoritative for the purposes of the constitutional issue raised by Appellants in the case at bar, because the ordinance in the cited case involved merely a nonexclusive grant of authority to a particular entity, whereas the statute involved in the case at bar involves both a prohibition and a grant of authority to different businesses.

Furthermore, the authority of the *Chaney* case is dubious, particularly in light of the decision of this Court in the more re-

cent case of *Planned Industrial Expansion Authority of the City of St. Louis* v. *Southwestern Bell Telephone Company,* 612 S.W.2d 772, 776-777 (1981), which was discussed at pages 101 to 102, and pages 109 to 110 of Appellants' oroginal Brief filed in the case at bar, because the case just cited held that a statute which "confers a special privilege and benefit upon telecommunications companies vis-a-vis other utility companies" was invalid because it only conferred easement rights with respect to public streets upon telephone and telegraph companies, but did not grant a similar easement to other public utilities. Indeed, it would be difficult to justify as current authority the *Chaney* case, cited in the Opinion of this Court, with the more recent decision in the *Southwestern Bell Telephone Company* case, decided by this Court in 1981.

There can be no reasonable doubt that §408.096 has the effect of making an irrevocable grant of special privileges and immunities to those businesses which transact business by arrangements of credit that are protected under certain statutes, recognized in §408.096 without specific designation, and prohibits arrangements of credit in business transactions not protected by such other statutes. The ordinance involved in the *Chaney* case did not involve any prohibition of rights in conjunction with the granting of rights under the ordinance there involved, unlike the double-barreled effect of §408.096 already described above.

6. At pages 11 to 14 of the Opinion of this Court, §408.096 is declared as not violating the provisions of Article III, §23 of the Missouri Constitution of 1945, which states that no Bill shall contain more than one subject which shall be clearly expressed in its title. In so holding, the primary issue addressed by the Opinion is the contention made by Appelalnts, at pages 116 to 125 of their original Brief, that the Bill of which §408.096 was a part when it was enacted by the 80th General Assembly as Con-

ference Committee Substitute for House Substitute for House Committee Substitute for Senate Substitute for Senate Bill No. 305, did not clearly express in its title the matter contained in §408.096, thereby violating the provisions of Article III, §23, of the Missouri Constitution of 1945. The gist of the Court's Opinion on this issue is that the title was sufficient to express clearly what appeared in §408.096, because the subject matter of §408.096 was encompassed by the reference in the title to matters relating to certain credit transactions. The title to the Bill in question here declares that it is an Act to repeal certain designated sections, relating to certain credit transactions, and to enact in lieu thereof forty new sections relating to the same subject. In fact, §408.096 was a new provision that was not in substitution for any statutory sections that were repealed by said Bill.

The authority relied upon by the Opinion of the Court in this case was the decision in *Edwards* v. *Businessmen's Assur. Co. of America,* 168 S.W.2d 82, 92 (1942). In that case the Supreme Court of Missouri upheld the validity of a statutory section that eliminated the defense of suicide in actions against insurance companies on insurance policies where the insured died as a result of suicide, except for situations in which the insured contemplated suicide at the time application was made for the insurance policy, that statutory section being new to the law of Missouri at the time of its enactment as part of a Bill for which the title was, "An Act to revise and amend the Insurance Laws of the State of Missouri."

A careful reading of the title to the Act that was involved in the *Edwards* case, as just quoted, indicates plainly that the title to the Act, and the new provision of the statutory section concerning the defense of suicide, were concerned with a similar subject matter, the statutory section representing one part of the subject of insurance laws, but it also indicates *that there was nothing in*

the title to the Act which indicated that the sections being adopted were to replace sections that were being repealed. Indeed, the title indicated that it was an Act to "revise and amend" the insurance laws, thereby suggesting that not only were old sections of the statute being amended, but that revisions in the nature of new provisions were involved.

It is quite apparent that the facts of the *Edwards* case are, therefore, substantially different from the facts in the case at bar, because the title to the Bill of which §408.096 was a part, as set forth at page 9 of Appellants' original Brief and as appearing in the record at R-21, plainly declares that it is an Act to repeal certain specified sections of the Missouri Statutes, relating to credit transactions, and to enact in lieu thereof forty new sections relating to the same subject. *Thus, the title to the Bill of which §408.096 was a part specifically limits the Bill's content to statutory provisions enacted to replace designated repealed sections.*

The constitutional imperatives underlying Article III, §23, of the Missouri Constitution of 1945, are not satisfied by the rationale of the Opinion of the Court in this case that this constitutional provision is satisfied if the subject matter of the particular section is simply within the scope of certain words contained in the title to the Bill, such as "certain credit transactions," if at the same time the subject matter of the particular statutory section, i.e. §408.096, is in contradiction to the other specific descriptive details of the title to the Bill which do not clearly express, or even suggest the presence of, the subject matter contained in the statutory section under examination.

It would serve no useful purpose here to repeat the authorities referred to at pages 116 to 125 of Appellants' original Brief, but Appellants here refer this Court to the discussion and authorities set forth therein for the proposition that this Court has misinterpreted the meaning and legal effect of Article III,

§23, of the Missouri Constitution of 1945, by relying upon the *Edwards* case, as a basis for upholding the validity of §408.096. Appellants submit that by reason of the limited scope of the title to the Bill of which §408.096 was a part, the title does not clearly express the subject matter contained in §408.096, and therefore this Court should sustain Appellants' contention that §408.096 is invalid as having been enacted in violation of Article III, §23, of the Missouri Constitution of 1945.

7. Appellants further call to the attention of the Court that the Order of April 2, 1981, of the trial court (R-203) reinstated the restraining order previously issued by that Court, but only "pending a decision by the Supreme Court." Underlying that restraining order is the bond approved by the trial court (R-61). It is not indicated in the Order specifically that the "Supreme Court" was intended to be the Supreme Court of Missouri, but it is possible that the Order of the trial court may be so construed. If the Supreme Court of Missouri was intended, then the restraining order would have lapsed on July 6, 1982, when the Opinion of this Court was filed.

As was indicated at page 5 of Appellants' original Brief, a determination that §408.096 was constitutionally valid would affect the right and ability of Appellants to exist, and would therefore lead to an appeal by Appellants to the Supreme Court of the United States under 28 U.S.C.A. §1257. It is the intention of Appellants, in the event that this Court should not reverse its position and declare invalid the provisions of §408.096, to file an appeal with the Supreme Court of the United States under the provisions of 28 U.S.C.A. §1257.

However, such an appeal would not be feasible if the effect of the decision of this court were not stayed pending a decision by the Supreme Court of the United States. It therefore is extremely urgent and important to Appellants that this Court reconsider its Opinion in this case, and include in the Opinion a stay of en-

forcement of the decision of this Court pending a decision of the Supreme Court of the United States in such further proceedings as are available to the Appellants before said Court. Without such an Order by this Court, the Appellants will suffer such irreparable harm that they will have no feasible way to pursue their opportunity for review of the decision of this Court by the Supreme Court of the United States.

Under Rule 44, subparagraph .4 of the Supreme Court of the United States, it is virtually mandatory that Appellants seek such stay of the judgment herein by application to this Court. Under V.A.M.R. 92.04 this Court has complete authority "*to stay proceedings during the pendency of an appeal* or to suspend, modify, restore, or grant an injunction during the pendency of an appeal *or to make any order appropriate to preserve the status quo* or the effectiveness of the judgment subsequently to be entered." (emphasis supplied). Appellants therefore request an appropriate Order of this Court that would stay the enforcement of the judgment herein which, at this time, upholds the validity of §408.096, at least until a final disposition of this case through all proceedings available to Appellants.

8. Appellants further state that their right under the United States Constitution, Amendment 14, §1, and under the Missouri Constitution of 1945, Article I, §1 and §2, not to be deprived by the State of Missouri of the equal protection of the laws and not to be deprived of their property without due process of law of necessity includes the right to a realistic and reasonable opportunity to assert such rights in appropriate judicial proceedings testing the constitutionality of V.A.M.S. §408.096, such as the proceedings involved in this case. The particular nature and effect of V.A.M.S. §408.096, as enacted, are such as would, as a practical matter, prevent Appellants from asserting such rights if the constitutional prohibitions of said statute were to be given effect and made applicable to business transactions conducted

by Appellants prior to the final disposition of this case through all legal proceedings in review available to Appellants.

Appellants submit that under V.A.M.R. 92.04, mentioned in paragraph 7 above, this Court has the authority to control the effect of the judgment in the manner herein suggested. Appellants further submit that if the Opinion of this Court is not withdrawn or modified in the respects herein suggested by Appellants, its effect will be such as to override those decisions and rules of procedure referred to in this Motion, which would justify this Court in modifying its Opinion so as to make it operative at the future time suggested herein.

Therefore, Appellants submit that if the Opinion filed by this Court on July 6, 1982, is not withdrawn or reversed, as herein prayed by Appellants, then at least the Opinion should be reconsidered and supplemented by an Order declaring that the provisions of V.A.M.S. §408.096 shall not be applicable to any business transactions conduct by, or entered into by the Appellants on or prior to a final disposition of this case, whether by review or refusal of review of this case by the Supreme Court of the United States, or by conclusion of such other proceedings as shall constitute a final disposition of this case.

9. For the foregoing reasons, Appellants submit that the Opinion of this Court has overlooked or misinterpreted the indicated material matters of fact and the indicated material matters of law, thereby reaching an incorrect result, all to the prejudice of these Appellants. If these oversights and misinterpretations are corrected, the Opinion of the Court could not properly affirm the actions and decision of the trial court, but would reverse the erroneous actions and decision of the trial court, and would give judgment for Appellants that would declare invalid the provisions of V.A.M.S. §408.096.

WHEREFORE, Appellants pray for an Order granting a rehearing on all matters referred to in this Motion, for withdrawal of the Court's Opinion filed on July 6, 1982, for a stay of enforcement of said judgment as herein sought, in the event said Opinion is not withdrawn or said judgment is not reversed, and for such other and further orders and decrees as are herein sought by Appellants and as to the Court shall seem just and proper.

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ROBERTS & HENEGHAN, INC.
L. W. HIGLEY
1015 Locust Street, Suite 700
St. Louis, Missouri 63101
(314) 421-1850

Attorneys for the Appellants

APPENDIX E

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI
65102

July 21, 1982

Mr. Warren H. Kawin
10th Floor, Aragon Place
7711 Carondelet Avenue
St. Louis, MO 63105

Re: Lincoln Credit Co., et al v. George Peach, et al.
Supreme Court No. 63018

Dear Mr. Kawin:

This is to acknowledge receipt of the original and seven copies of the following:

Appellants' Motion for Rehearing and Suggestions in Support thereof,

which we have this date filed in the above-entitled cause, showing service.

Very truly yours,

THOMAS F. SIMON

/s/ Norma Jean Creach
Deputy Clerk

APPENDIX F

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI
65102

August 2, 1982

Mr. Warren H. Kawin
10th Flr., Aragon Place
7711 Carondelet Avenue
St. Louis, Mo. 63105

Mr. L. W. Higley
1015 Locust, Suite 700
St. Louis, MO 63101

In re: Lincoln Credit Co., et al. v. George Peach, et al
No. 63018

Gentlemen:

This is to advise that the Court this day entered the following order in the above-entitled cause:

"Appellants' motion for rehearing overruled."

Very truly yours,

/s/ Thomas F. Simon
Clerk

cc: George Peach
David Wells

APPENDIX G

IN THE SUPREME COURT OF THE STATE OF MISSOURI
EN BANC

No. 63018

Lincoln Credit Co., D. H. Finance Corp., Ace F.S. Inc., C.F.S. Inc., Colonial Credit Inc., and Gateway Investment Corp.,

Appellants,

vs.

George Peach, as Circuit Attorney of the City of St. Louis, Missouri,

and

John Ashcroft, as Attorney General of the State of Missouri,

and

Beneficial Finance Co. of Missouri, Inc., Intervenor,

Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed September 1, 1982, Office of Clerk Supreme Court)

Notice is hereby given that LINCOLN CREDIT CO., D. H. FINANCE CORP., ACE F.S. INC., C.F.S. INC., COLONIAL CREDIT INC., and GATEWAY INVESTMENT CORP., the Appellants named above, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Missouri rendered on July 6, 1982, affirming the judgment of the Circuit Court of the City of St. Louis, Twenty-Second Judicial Circuit, Division No. 3, in

Case No. 794-0267 that upheld the constitutionality of §408.096, R.S.Mo. Supp. 1979, and from the final order of the Supreme Court of the State of Missouri, rendered on August 2, 1982, overruling Appellants' Motion for Rehearing that was timely filed with said Court on July 21, 1982.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

SUSMAN, SCHERMER,
RIMMEL & PARKER

By /s/ WARREN H. KAWIN - 14860
Tenth Floor, Aragon Place
7711 Carondelet Avenue
St. Louis, Missouri 63105
(314) 725-7300

ROBERTS & HENEGHAN, INC.

By /s/ L. W. HIGLEY - 26409
1015 Locust Street, Suite 700
St. Louis, Missouri 63101
(314) 421-1850

Attorneys for the Appellants

IN THE SUPREME COURT OF THE STATE OF MISSOURI
EN BANC

No. 63018

Lincoln Credit Co., D. H. Finance Corp., Ace F.S. Inc., C.F.S. Inc., Colonial Credit Inc., and Gateway Investment Corp.,

Appellants,

vs.

George Peach, as Circuit Attorney of the City of St. Louis, Missouri,

and

John Ashcroft, as Attorney General of the State of Missouri,

and

Beneficial Finance Co. of Missouri, Inc., Intervenor,

Appellees.

AFFIDAVIT OF SERVICE

STATE OF MISSOURI

SS.

COUNTY OF ST. LOUIS

WARREN H. KAWIN, being first duly sworn upon his oath, states that one copy of the attached Notice of Appeal to the Supreme Court of the United States has been filed on August 31, 1982, with the Clerk of the Supreme Court of the State of Missouri, at Post Office Box 150, Jefferson City, Missouri 65102, from whose judgment the appeal is being taken, and with the Circuit Court of the City of St. Louis, Twenty-Second Judicial Circuit, Division No. 3, at the Civil Courts Building,

Tucker and Market Streets, St. Louis, Missouri 63101, the Court possessed of the record, and has been duly served on August 31, 1982, on Thompson & Mitchell, One Mercantile Center, Suite 3400, St. Louis, Missouri 63101, attorneys of record for Appellee, Beneficial Finance Co. of Missouri, Inc., S. Francis Baldwin, P.O. Box 899, Jefferson City, Missouri 65102, attorney of record for Appellee John Ashcroft, as Attorney General of the State of Missouri, and on Appellee George Peach, as Circuit Attorney of the City of St. Louis, Missouri, Municipal Courts Building, 13th and Market Streets, St. Louis, Missouri 63103, all by depositing same in the United States mailbox, with first-class postage prepaid.

/s/ Warren H. Kawin

Subscribed and sworn to before me this 31st day of August, 1982.

/s/ Frances Jacks
Notary Public

APPENDIX H

IN THE SUPREME COURT OF THE STATE OF MISSOURI
EN BANC

No. 63018

Lincoln Credit Co., D. H. Finance Corp., Ace F.S. Inc., C.F.S. Inc., Colonial Credit Inc., and Gateway Investment Corp.,

Appellants,

vs.

George Peach, as Circuit Attorney of the City of St. Louis, Missouri,

and

John Ashcroft, as Attorney General of the State of Missouri,

and

Beneficial Finance Co. of Missouri, Inc., Intervenor,

Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed September 1, 1982)
(Joseph P. Roddy, Clerk Circuit Court)

Notice is hereby given that LINCOLN CREDIT CO., D. H. FINANCE CORP., ACE F.S. INC., C.F.S. INC., COLONIAL CREDIT INC., and GATEWAY INVESTMENT CORP., the Appellants named above, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Missouri rendered on July 6,

1982, affirming the judgment of the Circuit Court of the City of St. Louis, Twenty-Second Judicial Circuit, Division No. 3, in Case No. 794-0267 that upheld the constitutionality of §408.096, R.S.Mo. Supp. 1979, and from the final order of the Supreme Court of the State of Missouri, rendered on August 2, 1982, overruling Appellants' Motion for Rehearing that was timely filed with said Court on July 21, 1982.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

SUSMAN, SCHERMER,
RIMMEL & PARKER

By /s/ WARREN H. KAWIN - 14860
Tenth Floor, Aragon Place
7711 Carondelet Avenue
St. Louis, Missouri 63105
(314) 725-7300

ROBERTS & HENEGHAN, INC.

By /s/ L. W. HIGLEY - 26409
1015 Locust Street, Suite 700
St. Louis, Missouri 63101
(314) 421-1850

Attorneys for the Appellants

IN THE SUPREME COURT OF THE STATE OF MISSOURI
EN BANC

No. 63018

Lincoln Credit Co., D. H. Finance Corp., Ace F.S. Inc., C.F.S. Inc., Colonial Credit Inc., and Gateway Investment Corp.,

Appellants,

vs.

George Peach, as Circuit Attorney of the City of St. Louis, Missouri,

and

John Ashcroft, as Attorney General of the State of Missouri,

and

Beneficial Finance Co. of Missouri, Inc., Intervenor,

Appellees.

AFFIDAVIT OF SERVICE

STATE OF MISSOURI)
) SS.
COUNTY OF ST. LOUIS)

WARREN H. KAWIN, being first duly sworn upon his oath, states that one copy of the attached Notice of Appeal to the Supreme Court of the United States has been filed on August 31, 1982, with the Clerk of the Supreme Court of the State of Missouri, at Post Office Box 150, Jefferson City, Missouri 65102, from whose judgment the appeal is being taken, and with the Circuit Court of the City of St. Louis, Twenty-Second Judicial Circuit, Division No. 3, at the Civil Courts Building,

Tucker and Market Streets, St. Louis, Missouri 63101, the Court possessed of the record, and has been duly served on August 31, 1982, on Thompson & Mitchell, One Mercantile Center, Suite 3400, St. Louis, Missouri 63101, attorneys of record for Appellee, Beneficial Finance Co. of Missouri, Inc., S. Francis Baldwin, P.O. Box 899, Jefferson City, Missouri 65102, attorney of record for Appellee John Ashcroft, as Attorney General of the State of Missouri, and on Appellee George Peach, as Circuit Attorney of the City of St. Louis, Missouri, Municipal Courts Building, 13th and Market Streets, St. Louis, Missouri 63103, all by depositing same in the United States mailbox, with first-class postage prepaid.

/s/ Warren H. Kawin

Subscribed and sworn to before me this 31st day of August, 1982.

/s/ Frances Jacks
Notary Public

APPENDIX I

Missouri Statutes

The effect of V.A.M.S. §408.096 also depends upon the following Missouri statutes that pertain to small loans:

"**367.100.** As used in sections 367.100 to 367.200:

(1) "Consumer credit loans" shall mean loans for the benefit of or use by an individual or individuals:

(a) Secured by a security agreement or any other lien on tangible personal property or by the assignment of wages, salary or other compensation; or

(b) Unsecured and whether with or without comakers, guarantors, endorsers or sureties;

(2) "Director" shall mean the director of the division of finance or such agency or agencies as may exercise the powers and duties now performed by such director;

(3) "Lender" shall mean any person engaged in the business of making consumer credit loans. A person who makes an occasional consumer credit loan or who occasionally makes loans but is not regularly engaged in the business of making consumer credit loans shall not be considered a lender subject to sections 367.100 to 367.200;

(4) "Person" shall include individuals, partnerships, associations, trusts, corporations, and any other legal entities, excepting those corporations whose powers emanate from the laws of the United States and those which under other law are subject to the supervisory jurisdiction of the director of the division of finance of Missouri, the director of the division of credit unions or of the director of the division of savings and loan supervision of Missouri;

(5) "Supervised business" shall mean the business of making consumer credit loans, as herein defined, of money, credit, goods, or things in action."

"**408.100.** This section shall apply to all loans of twenty-five hundred dollars or less which are not made as permitted by other laws of this state except that it shall not apply to loans which are secured by a lien on real estate, nonprocessed farm products, livestock, farm machinery or crops or to loans to corporations. On any loan subject to this section, any person, firm, or corporation may charge, contract for and receive interest in any manner at rates which shall not exceed the following:

(1) On so much of the unpaid principal balance as does not exceed eight hundred dollars, 2.218% per month;

(2) On so much of the unpaid principal balance as exceeds eight hundred dollars but does not exceed twenty-five hundred dollars, one and one-quarter percent per month on that portion over eight hundred dollars."

"**408.140.** No further or other charge or amount whatsoever shall be directly or indirectly charged, contracted for or received for interest, service charges or other fees as an incident to any such extension of credit except as provided and regulated by sections 367.100 to 367.200, RSMo, and except:

(1) On loans for thirty days or longer which are other than "open end credit" as such term is defined in the federal Consumer Credit Protection Act and regulations thereunder, a fee, not to exceed five percent of the principal amount loaned or fifteen dollars, whichever is less, per loan made may be charged by the lender; however, no such fee shall be permitted on any extension, refinance, restructure or renewal of any such loan;

(2) The lawful fees actually and necessarily paid out by the lender to any public officer for filing, recording, or releasing in any public office any instrument securing the loan, which fees may be collected when the loan is made or at any time thereafter; and

(3) If the contract so provides, a charge for late payment on each installment in default for a period of not less than fifteen days in an amount not to exceed five percent of each installment due or fifteen dollars, whichever is less; provided, however, that a minimum charge of one dollar may be made."

"**408.150.** If any amount in excess of the interest permitted by sections 408.100 to 408.190 is charged or received on any loan except as the result of a bona fide error, the lender shall be barred from recovery of any interest on the contract and shall upon demand return all interest received to the person whom received. If such interest is not returned upon written demand, then the person paying the same or his legal representative may recover twice the amount paid together with costs of the suit and reasonable attorney's fees, provided that the action is brought within five years of such written demand."

"**408.190.** Section 408.120 to 408.180 and 408.200 shall not apply to any loan on which the rate or amount of interest charged or received is lawful without regard to the rates permitted in section 408.100."

As V.A.M.S. §408.140 above refers to V.A.M.S. §§367.100 to 367.200, those statutes all are relevant. Since §367.100(4) quoted above, does not apply to "corporations whose powers emanate from the laws of the United States and those which under other laws are subject to the supervisory jurisdiction of the director of the division of finance of Missouri, the director of the division of credit unions or

of the director of the division of savings and loan supervision of Missouri," the effect of all statutes affected by §367.100 depends upon a multitude of undesignated statutes, both Federal and of Missouri. Many Missouri statutes of relevance are in V.A.M.S. Chapters 362, 364, 367, 369, 370, 371 and 408.

APPENDIX J

Missouri Rules of Civil Procedure

This case also involves the issue of whether the Missouri summary judgment procedures, as interpreted and applied by the Missouri Supreme Court, violated the due process and equal protection provisions of Amendment 14, §1 of the Constitution of the United States. This issue involves the following Missouri Rules of Civil Procedure:

"73.01 Trial Without Jury or With an Advisory Jury—Procedure

(a) In cases tried without a jury or with an advisory jury:

(1) The court shall rule upon all objections to evidence as in jury cases. Where the evidence is ruled inadmissible the court upon request shall take and record the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the evidence is privileged.

(2) The court shall render such judgment that it thinks proper under the law and the evidence. If any party so requests before final submission of the case, the court shall dictate to the court reporter, or prepare and file, a brief opinion containing a statement of the grounds for its decision and the method of determining any damages awarded; and may, or if requested by counsel, shall, include its findings on such controverted fact issues as have been specified by counsel. All fact issues upon which no specific findings are made shall be considered as having been found in accordance with the result reached.

(3) Not later than 15 days after the entry of judgment, a party may, but need not, file a motion for new trial or a motion to amend the judgment and opinion, or both.

(b) For appellate review of cases tried without a jury or with an advisory jury, neither a motion for new trial nor a motion to amend the judgment is necessary to perserve any matter for appellate review.

(c) On appellate review:

(1) The court shall review the case upon both the law and the evidence as in suits of an equitable nature.

(2) Due regard shall be given to the opportunity of the trial court to have judged the credibility of witnesses.

(3) The court shall consider admissible evidence which was rejected by the trial court and preserved. The court may order that proferred evidence which was rejected by the trial court and not preserved be taken by deposition or by reference to a master under Rule 68.03 and returned to the appellate court."

"74.04 Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hear-

ing. The adverse party prior to the day of hearing may serve opposing affidavits. Judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Summary judgment, when appropriate, may be rendered against the moving party.

(d) Case Not Fully Adjudicated on Motion. If on motion under this Rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established and the trial shall be conducted accordingly.

(e) Form of Affidavits—Further Testimony—Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit af-

fidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may take such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this Rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) When Not Rendered. In no case shall a summary judgment be rendered on issue triable by jury or the court without a jury unless the prevailing party is shown by unassailable proof to be entitled thereto as a matter of law."

"81.12 Contents of the Record on Appeal—Designation of the Record on Appeal—Compiling, Ordering, Filing and Service of Record on Appeal—Errors, Omissions and Supplemental Record on Appeal

(a) Contents of Record on Appeal. The record on appeal shall contain all of the record, proceedings and evidence necessary to the determination of all questions to be presented, by either appellant or respondent, to the appellate court for decision. In order to reduce expense and expedite the preparation of the record on appeal, it is divided into two components, i.e. the "legal file" and the "transcript."

The legal file shall be so labeled with a cover page and contain clearly reproduced exact copies of the pleadings and other portions of the trial record previously reduced to written form.

The transcript shall contain the portions of the proceedings and evidence not previously reduced to written form.

The legal file shall always include, in chronological order: the pleadings upon which the action was tried, the verdict, the findings of the court or jury, the judgment or order appealed from, motions and orders after judgment, and the notice of appeal, together with their respective dates of filing or entry of record; except the parties may agree in writing upon an abbreviated or partial record on appeal or upon a statement of the case as provided in Rule 81.13.

(b) Matters Omitted. The record on appeal shall not include or set forth the original or any subsequent writ or the return thereto unless a question is raised as to the regularity of the process or its execution or as to the jurisdiction of

the court. If any pleading be amended the record on appeal shall include the last amended pleading and shall not set forth any abandoned pleadings or abandoned part of the record not introduced in evidence. No matter touching on the organization of the court, or any continuance, motion, or affidavit, not material to the questions presented for determination, shall be inserted in the record on appeal. Documentary evidence, where there is no dispute as to its admissibility or legal effect, may be stated according to its legal effect. Formal parts not in dispute shall be omitted. No part of the record when once set forth in the record on appeal should be repeated in any other part of the record on appeal.

The following items shall not be included in the record on appeal unless specifically requested and necessary to determination of issues on appeal: voir dire, opening statements, closing arguments, MAI 2.01, evidence regarding damages, briefs and memoranda, notices of filing, subpoenas, summonses, motions to extend time, affidavits and admissions of service and mailing, notices of settings, depositions and notices, and jury lists.

(c) Duty of Appellant to Order the Transcript and Compile the Record on Appeal. Within thirty days after the notice of appeal is filed, appellant shall order the transcript from the reporter or from the clerk if there was no reporter. The written order shall designate the portions of the proceedings and evidence not previously reduced to written form which are to be included in the transcript. A copy of the writtten order shall be filed with the appellate court and served on the respondent.

The appellant shall also prepare the legal file and deliver a copy to the respondent.

If the resondent is dissatisfied with the appellant's record on appeal, the respondent may file within the time

allowed for filing respondent's brief such additional parts of the record on appeal as respondent considers necessary.

(d) Record on Appeal—When and Where Filed and Served. Within the time prescribed by Rules 81.18 and 81.19 the appellant shall cause the record on appeal to be prepared in accordance with the provisions of these Rules and filed with the clerk of the proper appellate court. Within five days thereafter appellant shall serve a copy of the record on appeal on respondent and shall file a copy with the clerk of the trial court, which copy shall remain on file in the office of said clerk. Any party may file extra copies of the record prior to submission.

In cases of judicial review of administrative decisions or orders where the transcript of the record before the administrative agency is not copied into the record of the proceedings in the trial court but is filed separately as a part of the record on appeal as authorized by Rule 81.13(c) the appellant shall not be required to serve a copy of the record before the administrative agency on respondent or file a copy thereof with the clerk of the trial court, if a copy thereof theretofore has been delivered to respondent and filed with the clerk of the trial court.

(e) Errors—Omissions—Supplemental Record on Appeal. If anything material is omitted from the record on appeal, the parties by stipulation, or the appellate court, on a proper suggestion or of its own initiative, shall direct that the omission or misstatement be corrected. The appellate court may, if it deems necessary, order that a supplemental record on appeal be prepared and filed by either party or by the clerk of the trial court including any additional part of the trial record, proceedings, and evidence, or the clerk may be directed to send up any original documents or exhibits."

Office - Supreme Court, U.S.
FILED
NOV 26 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-743

In the Supreme Court of the United States

October Term, 1982

LINCOLN CREDIT CO., et al.,
Appellants,

vs.

GEORGE PEACH, Circuit Attorney of the City of St. Louis, Missouri, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

MOTION OF APPELLEES PEACH & ASHCROFT TO AFFIRM OR DISMISS

JOHN ASHCROFT
Attorney General of Missouri
JOHN M. MORRIS, III
Counsel of Record for Appellees Peach & Ashcroft
S. FRANCIS BALDWIN
Counsel for Appellees Peach & Ashcroft
Missouri Attorney General
P. O. Box 899
Jefferson City, Missouri 65102

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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No. 82-743

In the Supreme Court of the United States

October Term, 1982

LINCOLN CREDIT CO., et al.,
Appellants,

vs.

GEORGE PEACH, Circuit Attorney of the City of St. Louis, Missouri, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

MOTION TO DISMISS OR AFFIRM

Appellees, George Peach, the Circuit Attorney of the City of St. Louis and John Ashcroft, the Attorney General of the State of Missouri, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move to dismiss the appeal herein, or in the alternative, that the final judgment and decree of the Supreme Court of Missouri be affirmed on the ground that the questions presented are so unsubstantial so as not to warrant further argument.

STATEMENT

This is a direct appeal from the final judgment and decree of the Supreme Court of Missouri, affirming the judgment of the Circuit Court of the City of St. Louis, upholding the constitutionality of § 408.096, RSMo Supp. 1979 (effective September 28, 1979). Section 408.096 provides:

No person, firm or corporation shall receive or impose any fee or charge, other than one expressly provided for by statute, for arranging credit in the amount of one thousand dollars or less the proceeds of which are intended to be used by the borrower primarily for personal, family or household purposes. Any contract evidencing such excess fee or charge and any note evidencing credit so arranged is void. Any person, firm or corporation who receives or imposes a fee or charge prohibited by this section is guilty of a class B misdemeanor.

Appellants present the following questions:

1. Whether Missouri's statute, V.A.M.S. § 408.096, the effect of which is to make it a crime for an agent of a borrower to charge or receive a fee for arranging credit for the borrower, as Appellants lawfully did prior to the statute, and to make void any promissory note evidencing such credit, while allowing the agent of a lender, under other Missouri statutes, to charge and receive a fee for arranging the same kind of credit with impunity, creates invidious discrimination through a constitutionally faulty classification, without any reasonable relationship to a legitimate state interest, thereby depriving Appellants of their liberty of contract and their property without due process of law, and denying to Appellants the equal protection of the law in violation of Amendment 14, § 1 of the Constitution of the United States?

* * *

2. Whether Missouri's statute, V.A.M.S. § 408.096, which makes it a crime to impose or receive any fee, other than a fee "expressly provided for by statute, for arranging credit in the amount of $1,000.00

or less the proceeds of which are intended to be used by the borrower primarily for personal, family, or household purposes", is so vague and uncertain as to make its application to Appellants constitute a violation of Amendment 14, § 1 of the Constitution of the United States by depriving Appellants of their liberty of contract and their property without due process of law, when the prohibited "arranging credit" requires a determination by Appellants in each credit transaction of what fees are for "arranging" credit, what other statutes contain fees "expressly provided for by statute", and a determination of what "credit" is "intended to be used by the borrower primarily for personal, family or household purposes"?

3. Whether the Missouri summary judgment procedure has been interpreted and applied by the Missouri Supreme Court in such a manner as to deny to Appellants an opportunity to be heard at a meaningful time and in a meaningful manner on material issues in this case, in violation of the due process and equal protection clauses of Amendment 14, § 1 of the Constitution of the United States, particularly by the action of the Missouri Supreme Court in (1) adopting as fact the Appellees' theory of the state interest underlying the enactment of V.A.M.S. § 408.096, when such theory is not supported by anything in the Record on Appeal and thus, under Missouri case precedent, is not entitled to be taken into consideration on appeal; (2) applying a Missouri vagueness test for non-criminal statutes instead of the applicable Federal test for criminal statutes, as briefed by Appellant; and (3) refusing to consider, or ignoring two issues briefed by Appellants, namely, the vagueness of certain statutory provisions, and the violation of substantial property

interests of Appellants arising under Article 3, § 44 of the Missouri Constitution 1945 which requires that "rates of interest fixed by law shall be applicable generally and to all lenders without regard to the type or classification of their business"?

• • •

ARGUMENT

The Case Presents No Substantial Question Not Previously Decided By This Court

I.

Equal Protection
No Invidious Discrimination

The decision of the Missouri Supreme Court is plainly correct. Under the police power of the state, the legislature may prohibit an occupation or calling, whether useful or not. *Ferguson v. Skrupa*, 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963). It is only necessary that the classification made by the law may be said to be reasonably supported by any conceivable state of facts in that the propriety, wisdom and expediency of legislation enacted pursuant to the police power of the state is a matter for the legislature. *Western & S. L. Ins. Co. v. Board of Equalization*, 451 U.S. 648, 101 S.Ct. 2070, 68 L.Ed.2d 514 (1981); *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed. 2d 393 (1961). State statutes touching upon business and industrial conditions need not be in every respect logically consistent with their aim to be constitutional. It is enough that there is a perceived evil to be corrected and that it might be though that a particular legislative measure is a rational way of doing so. Thus the Supreme Court will not strike down state laws regarding business and indus-

trial conditions merely because they may be unwise, improvident or out of harmony with a particular school of thought. *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955). Nor does the constitution demand a perfect congruence between the classification and the end to be served thereby. Laws may be underinclusive or overinclusive. *Tussman & TenBroek, The Equal Protection of the Laws*, 37 Calif. L.Rev. 341 (1949).

Section 408.096, RSMo Supp. 1979, rests upon a rational basis in that the legislature may have reasonably found that those in need of small loans for personal, family or household purposes are in need of special protection as it was within the legislative prerogative to find that firms and others engaged in the business of arranging credit frequently extort large sums from the poor and uneducated in need of small, personal loans, i.e., those least able to protect themselves from usury, outrageous fees, adhesion contracts and unconscionable bargains. Further, the General Assembly may have found that such firms "string the poor along" from payday to payday, charging outrageous sums under the guise of fees and commissions so that the borrower is forced to borrow again and again in the hope of paying off the loan, thereby creating a system of perpetual indebtedness and servitude.

While it is true § 408.096 is underinclusive in that agents of borrowers are not permitted to charge a fee "for arranging credit in the amount of one thousand dollars or less the proceeds of which are intended to be used by the borrower primarily for personal, family or household purposes", while agents of lenders are allowed to charge up to two percent per month pursuant to § 408.096, RSMo Supp. 1979, the statutory scheme creates no invidious discrimination.

Historically, Missouri has viewed the fees of agents of lenders as interest, while the fees of borrowers' agents have been treated as brokerage fees. *State v. Sargent,* 241 Mo.App. 1085, 256 S.W.2d 265 (Mo.App., St.L.D. 1953); *Allen v. Newton,* 219 Mo.App. 74, 266 S.W. 327 (K.C. 1924); § 408.095, RSMo 1978. Under the police power of the state, the legislature has put a ceiling of two percent interest per month (including the fees of the lenders' agents), while not providing for a fee or commission for the borrowers' agents *in only a very limited class of loans.* Given Missouri's historical classification of lenders' agents' fees as interest and borrowers' agents' fees as brokerage commissions, the legislature may have decided it was too difficult to police borrowers' agents in this limited class of transactions as their fees might not be typically recited in notes, since their fees are not considered interest, whereas the fees of the lenders' agents would be typically recorded and evidenced in the notes as their fees are considered interest. Under this scheme greater protection is given to the poor.

II.

Vagueness

Appellants contend that § 408.096 is unconstitutionally vague because in each credit transaction appellants must determine what fees are for "arranging" credit, which statutes contain fees "expressly provided for by statute" and determine what "credit" is "intended to be used by the borrower primarily for personal, family or household purposes." Appellants' claims are unsubstantial. They were able to plead their conduct was proscribed by § 408.096 and the statute is clear on its face.

The test of whether a criminal statute is unconstitutionally vague is whether the terms of the statute are

so vague that men of common intelligence must necessarily guess at their meaning and differ as to their application. *Connally v. General Construction Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926).

Terms such as "arranging credit" and "primarily for personal, family or household purposes" are no strangers to statutory enactments or to the courts. The phrase "arranges credit" is used in the Truth in Lending Act, specifically in subsection (f) of § 1602 of Title 15 U.S.C. It states in pertinent part: "Notwithstanding the previous sentence, a person who regularly *arranges* for the extension of consumer *credit* . . . is a creditor. . . ." (Emphasis added). Such phrases as "arranges credit" or phrases very similar thereto have also been construed in quite a few cases without any difficulty. See *Whitlock v. Midwest Acceptance Corp.*, 575 F.2d 652 (8th Cir. 1978); *Manning v. Princeton Consumer Discount Co.*, 533 F.2d 102 (3rd Cir. 1976); *Union Mortgage Banking & Trust Co. v. Hagwood*, 97 F. 360 (D.S.C. 1899); *Gerasta v. Hibernia National Bank*, 411 F.Supp. 176 (E.D. La. 1976); *Thompson-Starrett Co. v. Masons' Administrator*, 304 Ky. 764, 201 S.W.2d 876 (1946).

Nor is the phrase "primarily for personal, family or household purposes" unknown to legislative enactments. The Congress has employed substantially similar language in the Bankruptcy Code and in the Fair Credit Reporting Act. Subdivision 3 of subsection (d) and subdivision (f)(2)(A) of § 522 of Title 11 U.S.C. use the phrase "held primarily for the personal, family, or household use. . . ." Similarly 15 U.S.C. § 1681a(d) uses the phrase "to be used primarily for personal, family or household purposes. . . ."

Section 408.096 is no more vague than statutes which have been upheld by this Court—such as the Maryland statute which made it a crime for certain retailers to

sell on Sunday merchandise essential to, or customarily sold at, or incidental to, the operation of bathing beaches and amusement parks, or even the Robinson-Patman Act, which makes it a crime to sell goods at unreasonably low prices for the purposes of destroying or eliminating competition. See *McGowan v. Maryland; United States v. National Dairy Products Corp.*, 372 U.S. 29, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963). Further, it is the policy of this Court to give criminal statutes a narrow construction and limit vagueness arguments to facts actually before the Court, thereby preventing the application of statutes to hypothetical circumstances in which reasonable men might differ. *United States v. National Dairy Corp.; Williams v. United States*, 341 U.S. 97, 71 S.Ct. 576, 95 L.Ed. 774 (1951). In the instant case Appellants merely wish to address hypothetical factual situations to the Court and therefore should not be heard further.

III.

Summary Judgment Procedure Constitutional

Appellants attack the Missouri summary judgment procedure as being unconstitutional in that (1) the Supreme Court of Missouri adopted Appellees' theory of the state interest underlying the enactment of § 408.096, when there are no facts in the record supporting such interest; (2) because the Missouri Supreme Court applied the Missouri vagueness test for non-criminal statutes instead of the applicable federal test, and (3) because the Supreme Court of Missouri failed to address two issues raised by Appellants.

Appellants fail to raise any substantial issues.

A.

State Interest
Adjudicative v. Legislative Facts

In examining legislation under the due process and equal protection clauses of the Fourteenth Amendment, the classification made by the statutes will be upheld if any conceivable state of facts may be said to support the classification. *Western & S. L. Ins. Co. v. Board of Equalization; McGowan v. Maryland.* The facts themselves need not be actual but merely possible. *Adams v. Tanner,*[1] 244 U.S. 590, 37 S.Ct. 662, 61 L.Ed. 1336 (1917) (Brandeis, J. dissenting). This Court has stated:

> "Even in the absence of [reports of legislative committees] the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of legislators."

United States v. Carolene Products Co., 304 U.S. 144, 152, 58 S.Ct. 778, 82 L.Ed. 1234, 1241 (1938) (footnotes omitted).

The Notes of the Advisory Committee on the Proposed Rules to F.R.E. 201 at subdivision (a) define such facts as legislative facts. The Notes state in pertinent part: "Legislative facts . . . are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court in the enactment of a legislative body." As such, such facts need not be proven upon the record.

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1. Overruled by *Ferguson v. Skrupa.*

Therefore, Appellants have failed to assert any substantial question on this point.

B.

Appropriate Vagueness Test

Appellants claim that the appropriate vagueness test for a criminal statute is whether the terms of the statute are so vague that men of common intelligence must necessarily guess at their meaning and differ as to their application. *Connally v. General Construction Co.* Appellees Peach and Ashcroft do not dispute this. However, Appellants claim the Supreme Court of Missouri applied the wrong test.

In its opinion, the Supreme Court of Missouri stated (A-7):

> If the terms or words used in a statute are of common usage and are understandable by persons of ordinary intelligence, they satisfy the constitutional requirement as to definiteness and certainty. Prokopf v. Whaley, 592 S.W.2d 819, 824 (Mo. banc 1980). Where, however, the statutory terms are of such uncertain meaning, or so confused that the courts cannot discern with reasonable certainty what is intended, the statute is void.

While the language employed by the Supreme Court of Missouri may lack the precision of this Court's articulation, the Supreme Court of Missouri has applied the applicable federal test. If the terms or words used in the statute are of common usage and are understandable by persons of ordinary intelligence, then men of common understanding need not guess at their meaning or differ as to their application. Similarly, courts must strike down statutes which employ terms of uncertain meaning or which cannot be discerned with reasonable certainty.

Certainly it would have been better if the Missouri Supreme Court had used the same language as enunciated by this Court, but its mere failure to do so does not give rise to a substantial federal question, particularly in light of the Missouri Supreme Court's entire analysis of the vagueness question.

C.

Failure To Address Issues

Appellants claim the Supreme Court of Missouri failed to address two issues they briefed—(1) the vagueness of certain statutory sections and (2) the violation of Appellants' substantial property interests arising under Article III, § 44 of the Missouri Constitution of 1945.

With respect to Appellants' "substantial property interest arising under Article III, § 44 of the Missouri Constitution," the Missouri Supreme Court specifically considered and denied Appellants' point because it found § 408.096 not to be a special law, and thereby not in contravention of Article III, § 44 (A-8): Having determined that Appellants had no property right under Article III, § 44 of the Missouri Constitution of 1945, no federal constitutional issue remains to be determined as state courts have supreme power to interpret the written and unwritten law of the state, and thus a decision based on a question of state law, even if erroneously determined, does not confer appellate jurisdiction on the United States Supreme Court. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930).

With respect to Appellants' other contention that the Supreme Court of Missouri failed to address all issues relating to vagueness, the Supreme Court was under no compulsion to do so as the issues were not raised in the trial court. *School District of Kansas City v. Smith*, 111 S.W.2d 167 (Mo. 1937) (A-8-9).

CONCLUSION

Wherefore, Appellees Peach and Ashcroft respectfully submit that the questions upon which this cause depends are so unsubstantial as not to need further argument, and Appellees Peach and Ashcroft respectfully move the Court to dismiss this appeal, or in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Missouri.

Respectfully submitted,

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Counsel of Record for Appellees Peach and Ashcroft
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APPENDIX

APPENDIX A

SUPREME COURT OF MISSOURI
EN BANC

No. 63018

Lincoln Credit Co., et al.,
Appellants,

vs.

George Peach, et al.,
Respondents.

APPEAL FROM THE CIRCUIT COURT
OF THE CITY OF ST. LOUIS

Twenty-Second Judicial Circuit-Division No. 3
HONORABLE MURRY L. RANDALL, Judge

(Filed July 6, 1982)

In 1979, the Missouri General Assembly enacted § 408.096, RSMo Supp. 1979 (effective September 28, 1979). It provides as follows:

> No person, firm or corporation shall receive or impose any fee or charge, other than one expressly provided for by statute, for arranging credit in the amount of one thousand dollars or less the proceeds of which are intended to be used by the borrower primarily for personal, family or household purposes. Any contract evidencing such excess fee or charge and any note evidencing credit so arranged is void. Any person, firm or corporation who receives or imposes a fee or charge prohibited by this section is guilty of a class B misdemeanor.

On September 7, 1979, appellants filed a suit for declaratory judgment in the Circuit Court of the City of St. Louis and sought to have § 408.096 declared void on the grounds that it violated the United States Constitution and the Missouri Constitution.

Appellants' petition stated that they were corporations duly organized under the laws of the State of Missouri for the purpose of arranging credit between a borrower and a third-party lender; that appellants receive a fee for such services; that the loan is usually evidenced by a promissory note between the borrower and the third-party lender; that the effect of § 408.096 was to make unlawful the previously lawful business conducted by appellants because they arrange only loans of $1,000 or less for personal, family or household purposes; that enforcement of § 408.096 would prohibit appellants from collecting the fee charged for arranging loans and would prohibit third-party lenders from collecting money loaned to the borrowers; and that the effect of the statute is to invalidate loans already contracted for and thus to subject appellants to suit by the third-party lenders who loaned money to appellants' clients. Appellants pleaded that § 408.096 violates provisions of the Missouri Constitution and of the United States Constitution. Appellants also requested that the court enjoin George Peach, Circuit Attorney for the City of St. Louis, and John Ashcroft, Attorney General of the State of Missouri, from prosecuting them under the statute.

On September 7, 1979, the circuit court issued a temporary restraining order against defendants Peach and Ashcroft. On September 25, 1979, October 11, 1979, and November 29, 1979, amended restraining orders were entered. On December 13, 1979, all parties consented to an order continuing the last amended restraining order until further court order.

On October 24, 1980, appellants filed a motion for summary judgment which requested the trial court to find that § 408.096 destroyed appellants' business and that it violated both the United States Constitution and the Missouri Constitution.

On March 16, 1981, the trial court entered a summary judgment denying appellants' constitutional attacks on § 408.096. The court held that the statute was not invalid or void, and declared that the temporary restraining order had expired. On March 26, 1981, appellants filed a motion to modify the summary judgment decree, declared their intent to appeal directly to this Court, and requested that the trial court stay that part of the decree which vacated the temporary restraining order pending this Court's disposition of the case. On April 21, 1981, the trial court entered an order which granted that request. Notice of appeal was then filed with this Court.

The basic test to determine whether a plaintiff has standing to bring suit for declaratory and injunctive relief is whether he has a legally protectible interest at stake. Schweig v. City of St. Louis, 569 S.W.2d 215 (Mo. App. 1978). Missouri courts have held that whether a party can lawfully engage in its business under a particular state presents a situation where that party has a legally protectible interest. State ex rel. Eagleton v. McQueen, 378 S.W.2d 449, 452 (Mo. banc 1964). Moreover, such a question constitutes a justiciable controversy under the declaratory judgment act even though no enforcement of that statute has yet been commenced against that party. *Id.*, at 452. Therefore, there is a justiciable controversy here. This Court has jurisdiction because this case involves the validity of a statute of this state. Mo. Const. Art. V, § 3.

Appellants first contend that the trial court erred in failing to declare § 408.096 unconstitutional, as applied to contracts made prior to its effective date, because the statute voids those contracts, criminally punishes appellants for receipt of payments under those contracts, and prohibits future receipt of payments due under them.

As a general rule, statutes operate prospectively. St. Louis County v. University City, 491 S.W.2d 497, 499 (Mo. banc 1973). This rule controls unless the legislative intent that they be given retroactive operation clearly appears from the express language of the act or by necessary or unavoidable implication. *Id.* However, although a statute can operate retroactively, proscriptions exist against retrospective laws, ex post facto laws, and laws that impair contract obligations. Mo. Const. Art. I, § 13; Planned Industrial Expansion Authority of the City of St. Louis v. Southwestern Bell Telephone Company, 612 S.W.2d 772, 775 (Mo. banc 1981). A retrospective law, as that term is used in the Missouri Constitution, is one which impairs existing vested civil rights. Clark v. Kansas City, St. Louis & Chicago Railroad, 219 Mo. 524, 532, 118 S.W. 40, 43 (1909). More specifically, Mo. Const. Art. I, § 13 prohibits subsequent legislation from invalidating contracts lawful at the date of their making. *See* Home Telephone Company v. Sarcoxie Light & Telephone Company, 236 Mo. 114, 132, 139 S.W. 108, 112 (banc 1911). Of course, this constitutional provision has no application in a situation where the law is enacted before the contract is entered into. *See* State v. Laurisden, 312 S.W.2d 140, 143 (Mo. 1958).

An ex post facto law is one which denounces as criminal acts which were non-criminal when committed or which changes penalties for criminal violations after such violations are committed. State ex rel. Jones v. Nolte, 350 Mo. 271, 284, 165 S.W.2d 632, 638 (banc 1942).

In our view, § 408.096 should not and cannot be applied retroactively to invalidate the loan contracts which appellants entered into prior to its effective date. First, there is no express language indicating that it should apply retroactively. Second, application of the law to invalidate the contracts made before its effective date would contravene the constitutional proscription in Mo. Const. Art. I, § 13 against retrospective laws and laws which impair contract obligations. Furthermore, such operation would constitute an ex post facto law because it would make receipt of payments under the contracts criminal whereas when the contracts were made such receipt was not criminal.

A basic maxim of statutory construction requires that a court faced with a constitutional challenge to a statute must, if possible, construe it in favor of constitutionality. Cascio v. Beam, 594 S.W.2d 942, 946 (Mo. banc 1980). Therefore, § 408.096 must be construed to operate prospectively only. So construed, § 408.096 is not unconstitutional for the reasons first urged by appellants.

Appellants next assert that the trial court erred in not finding that § 408.096 deprives them of equal protection of the law as guaranteed by U. S. Const., Amend. 14, § 1, and Mo. Const. Art. I, § 2, and deprives them of property without due process of law as guaranteed by U. S. Const., Amend. 14, § 1, and Mo. Const. Art. I, § 1.

The substantial state interest asserted by the Attorney General to justify the enactment of § 408.096 is as follows:

> "Section 409.096 [sic] must be upheld as the Missouri legislature could have reasonably found that businesses and others engaged in the business of arranging credit frequently extort large sums from

> the poor and uneducated in need of small, personal loans, i.e., those least able to protect themselves from usury, outrageous fees, adhesion contracts and unconscionable bargains. Further, the legislature could have found that such businesses 'string the poor along' from payday to payday, charging outrageous sums under the guise of fees and commissions so that the borrower is forced to borrow again and again in the hope of paying off the loan, thus creating a system of perpetual indebtness [sic] and servitude. Further, the legislature could have found that the industry has for years been notoriously abusive of those in need of quick cash for personal purposes and that strong measures were needed."

In our view, "[a] rational legislature could have based its decision on such considerations." Ross v. Kansas City General Hospital and Medical Center, 608 S.W.2d 397, 399 (Mo. banc 1980). "It is enough that there is an evil at hand for correction, and that it might be thought that . . . [this] particular legislative measure was a rational way to correct it. . . . The prohibition of the Equal Protection Clause goes no further than the invidious discrimination. We cannot say that that point has been reached here." Williamson v. Lee Optical Co., 348 U.S. 483, 488, 489 (1955). We cannot invalidate the underinclusive § 408.096 as unconstitutionally arbitrary.

Appellants' next claim is that the phrase "arranging credit" in § 408.096 is an unconstitutionally vague and uncertain limitation on appellants' businesses, resulting in a deprivation of property without due process of law.

In context, the specified phrase appears as follows:

> No person, firm or corporation shall receive or impose any fee or charge, other than one expressly

provided for by statute, for *arranging credit* in the amount of one thousand dollars or less . . . . (emphasis added.)

If the terms or words used in a statute are of common usage and are understandable by persons of ordinary intelligence, they satisfy the constitutional requirement as to definiteness and certainty. Prokopf v. Whaley, 592 S.W.2d 819, 824 (Mo. banc 1980). Where, however, the statutory terms are of such uncertain meaning, or so confused that the courts cannot discern with reasonable certainty what is intended, the statute is void. *Id.* On a challenge to a statute or ordinance as being unconstitutionally vague it is not necessary to determine if a situation could be imagined in which the language used might be vague or confusing but rather, the language is to be treated by applying it to the facts at hand. *Id.*

"Arrange" is defined in Webster's Third New International Dictionary (1965), as "to put in order beforehand; make preparations for . . . ." In a statute related to § 408.096, "arranged" is defined as "to provide or offer to provide a loan which is or will be extended by another person . . . ." § 408.400(1), RSMo 1978. Although we can find no cases in which the word "arrange" has been construed by courts of this state in the context of a loan or credit transaction, as here, other courts have had such opportunities. *E.g.*, Whitlock v. Midwest Acceptance Corporation, 575 F.2d 652 (8th Cir. 1978); Manning v. Princeton Consumer Discount Company, 533 F.2d 102, 104 (3d Cir. 1976); Union Mortgage Banking & Trust Company v. Hagwood, 97 F. 360, 364 (D.S.C. 1899); Gerasta v. Hibernia National Bank, 411 F.Supp. 176, 178 (E.D. La. 1975); Thompson-Starrett Company v. Masons' Administrators, 201 S.W.2d 876, 880 (Ky. 1946). Despite their different fact patterns, these cases define "arrange" consistently with those definitions set out above.

The facts of appellants' routine business dealings with their clientele are undisputed. In their own pleadings and brief, appellants state that they meet with their clients to *arrange credit*. This involves pledging appellants' credit, in favor of the client, to a third-party lender who actually lends the money. Appellants charge a fee for their services of arranging and guaranteeing the loan. The agreement reached is usually evidenced in a written contract.

No more need be said than that the phrase "arranging credit", as employed in § 408.096, clearly encompasses appellants' acts in obtaining from third-party lenders loans for their customers. The challenged language of the statute is not unconstitutionally vague when examined in light of the facts of this case, and there is no need to attempt to resolve the statute's constitutionality under any hypothetical set of facts. *Prokopf v. Whaley*, 592 S.W.2d at 824. Appellants raise, in their brief, many other allegations regarding the unconstitutional vagueness of certain other phrases in § 408.096. However, these contentions were not presented to the trial court and it has long been stated that this Court will not, on review, convict a lower court of error on an issue which was not put before it to decide. School District of Kansas City v. Smith, 111 S.W.2d 167, 168 (Mo. 1937); Alexander v. Haden, 2 Mo. 211, 212 (1830).

The trial court's finding that the statute was not unconstitutional for vagueness must be sustained.

Appellant's next several points of error hinge upon the allegation that § 408.096 is unconstitutional as a special law. They argue that because § 408.096 is a special law it violates many constitutional provisions, to wit: (1) Mo. Const. Art. XI, § 2, because it amends the corporate charter

of each appellant by special law; (2) Mo. Const. Art. III, § 40(27), which prohibits regulation of trade by special law in that businesses other than appellants are not affected by the prohibitions and penalties of § 408.096; (3) Mo. Const. Art. IV, § 40(28), which prohibits any grant of special or exclusive rights, privileges, and immunities in that other businesses are unaffected by the prohibitions and penalties of § 408.096; (4) Mo. Const. Art. III, § 42, which requires thirty days notice of intention to pass a special law in that such notice was not given; (5) Mo. Const. Art. III, § 44, which prohibits any law fixing rates of interest for any particular group or class engaged in lending money; and (6) Mo. Const. Art. III, § 40(26), which prohibits any special law fixing the rate of interest.

The resolution of the assertion that § 408.096 constitutes a special law is dispositive of all the points raised.

In our view, the assertion is without merit. The statute applies uniformly to all persons, firms or corporations. As indicated *supra*, § 408.096 is not "unconstitutionally arbitrary." It is well-established that "a law is not special if it applies to all of a given class alike and the classification is made on a reasonable basis." Ross v. Kansas City General Hospital and Medical Center, 608 S.W.2d 397, 400 (Mo. banc 1980).

Appellants next urge that the trial court erred in not finding that § 408.096 violates Mo. Const. Art. I, § 13, because it has the effect of making an irrevocable grant of special privileges and immunities to businesses other than appellants in that appellants are affected by the prohibitions and penalties of the statute while other businesses are not. They now assert that the business transactions excepted from § 408.096 are set out in "V.A.M.S. §§ 408.095, 408.140, 408.190, 408.250, 408.300, and 408.400 to 408.415."

Article I, § 13 of the Missouri Constitution provides that no law "making any irrevocable grant of special privileges or immunities, can be enacted." It has been held that the constitutional proscription applies to privileges or immunities granted to "a person or class of persons to the *exclusion of others* and in derogation of common right." State ex inf. Chaney v. West Missouri Power Co., 313 Mo. 283, 297, 281 S.W. 709, 713 (1926). As indicated *supra*, § 408.096 applies uniformly to all persons, firms or corporations. The assertion is without merit.

Appellants next urge that the trial court erred in not finding that the bill, of which § 408.096 was a part, was so amended in its passage as to change its original purpose, in violation of Mo. Const. Art. III, § 21. The constitutional provision upon which appellants rely provides in pertinent part as follows:

> Section 21. *Style of laws—bills—limitation on amendments—power of each house to originate and amend bills—reading of bills.*—No law shall be passed except by bill, and *no bill shall be so amended in its passage through either house as to change its original purpose.* Bills may originate in either house and may be amended or rejected by the other. (emphasis added.)

The title of the original Senate Bill 305 was as follows:

> An Act [t]o repeal sections 408.030, 408.050, 408.060, and 408.070, RSMo 1978, *relating to interest*, and to enact in lieu thereof three new sections relating to the same subject, with penalty provisions. (emphasis added.)

while the title to the Senate Bill 305 actually passed is as follows:

> An Act [t]o repeal sections 408.015, 408.020, 408.030, 408.031, 408.036, 408.052, 408.100, 408.140, 408.200, 408.220, 408.250, 408.255, 408.256, and 408.300 RSMo 1978, *relating to certain credit transactions* and to enact in lieu thereof forty new sections relating to the same subject, with penalty provisions, an effective date covering certain sections, and an emergency clause for a specific section. (emphasis added.)

Appellants' argument here is accurately stated in syllogistic fashion: (1) Mo. Const. Art. III, § 21, prohibits amending any bill through its passage in either house as to change its original purpose; (2) the original Senate Bill 305 solely concerned interest, as evidenced by its title and the statutory sections contained therein; (3) Senate Bill 305, as actually adopted, contains numerous sections which do not relate to interest at all, including § 408.096; (4) therefore, the inclusion of § 408.096 in the adopted Act violated Mo. Const. Art. III, § 21, because it related to a purpose [*i.e.*, credit transactions] different from that of the original bill [*i.e.*, interest]. Appellants also contend that the presence of § 408.096 in only the amended Act violated Mo. Const. Art. III, § 21, because its provisions were new, and concerned a subject different from that in the original bill.

Resolution of the contentions made requires comparison of the purpose of the original Senate Bill 305 and of Senate Bill 305 as actually passed.

Here, as with all challenges to the constitutionality of a statute, there must be facts pleaded in support of the attack, City of St. Louis v. Butler Co., 358 Mo. 1221, 219 S.W.2d 372 (banc 1949), and the burden of proof is on those who attack the statute. Atkins v. Department of Building Regulations, City of Springfield, 596 S.W.2d 426, 434 (Mo. 1980).

The constitutional limitation that no bill may be so amended as to change its original purpose is "designed to prevent the enactment of amendatory statutes in terms so blind that legislators themselves . . . [would be] . . . deceived in regard to their effect, and the public, from difficulty in making the necessary examination and comparison, [would fail] to become apprised of the changes in the laws." State v. Ludwig, 322 S.W.2d 841, 847 (Mo. banc 1959). "Purpose" is the key word in the provision, and it means the general purpose of the bill, not the mere details through which and by which that purpose is manifested and effectuated. Brown-Forman Distillers Corp. v. McHenry, 566 S.W.2d 194, 196 (Mo. banc 1978). The restriction is against the introduction of matter which is not germane to the object of the legislation or which bring about an extension or limitation of the scope of the bill are not prohibited; even new matter is not excluded if germane. *Id.* It is noteworthy that the title of an act, "though performing a most important function, is still not strictly a part of the act proper." State ex rel. Aull v. Field, 119 Mo. 593, 609, 24 S.W. 752, 755 (banc 1894); *see also,* Allied Mutual Insurance Co. v. Bell, 353 Mo. 891, 899, 185 S.W.2d 4, 8 (1945).

Examination of the provisions of the original Senate Bill 305 shows that it is related to a variety of aspects of the same subject matter—credit transactions. For example, sections therein concerned lawful interest rates, causes of action for excessively extracted interest (including damages, costs, and statutes of limitation), negotiability of notes, availability of usury as a defense to the enforcement of a promissory note, etc. These are not different subjects but rather are naturally related in the legislature's attempt to govern credit transactions.

The amendments made to this bill, as evidenced by the text of the finally amended bill which was passed, were

not made in violation of Art. III, § 21. They, like the sections in the original bill, relate to credit transactions. The additions to the original bill do not run afoul of the constitution. Even alterations which would extend the scope of the bill are not prohibited. *Brown-Forman Distillers Corp. v. McHenry*, 566 S.W.2d at 196.

Nor does the change in the bill's title affect its constitutional validity. The title is not a part of the bill and so can be changed without violating Art. III, § 21. *See, State ex rel. Aull v. Field*, 24 S.W. at 755 (Mo. banc 1894). Appellants assert that the amended Senate Bill 305 violated Art. III, § 21, because § 408.096 and other sections do not relate to interest, as the title of the original bill indicated. A study of both bills illustrates that the purpose of both was to govern and regulate credit transactions. The title of the original bill was rightly changed to reflect the real scope of subject matter in the bill. The title of Senate Bill 305, as enacted, is accurate and constitutional.

The provisions of § 408.096 clearly relate to credit transactions and so are properly within the purpose of the bill. This puts to rest appellants' contention that the statute should not be included in Senate Bill 305 on the ground that it did not exist previously.

The trial court's finding that Mo. Const. Art. III, § 21, was not violated must be sustained.

Appellants contend that the title of Senate Bill 305 violates Mo. Const. Art. III, § 23, which provides that "[n]o bill shall contain more than one subject which shall be clearly expressed in its title . . . ." Appellants claim: (1) the bill contains more than one subject, and (2) the bill's title is in fact misleading and deceptive because it (a) gives the impression that the subject matter covered by § 408.096 was covered in previous Missouri

legislation although it was not, and (b) "creates the impression that it merely relates to the regulation of certain credit transactions, and certain penalty provisions, all as covered by legislation being repealed by the bill whereas the legislation has the effect of prohibiting, not just regulating [business] [,] . . . and the legislation not only concerns penalties, but in fact creates civil and criminal liabilities for . . . [appellants] . . . which liabilities never existed under prior Missouri legislation."

The purpose of Art. III, § 23, is to ensure that the title of a bill generally indicates what the act contains so that neither the legislature nor the public is misled. State ex rel. Wagner v. St. Louis County Port Authorities, 604 S.W. 2d 592, 602 (Mo. banc 1980). The title need not express the limitations in the body of the act, but where the title of an act descends to particulars and details, the act must conform to the title as thus limited by the particulars and details. Hunt v. Armour, 345 Mo. 677, 681-682, 136 S.W. 2d 312, 314 (1939). The title to an act will be valid if it indicates the general contents of the act and if the contents fairly relate to and have a natural connection with the subject expressed in the title. *State ex rel. Wagner v. St. Louis County Port Authority*, 604 S.W.2d at 601. Mere generality of title will not prevent the act from being valid, where the title does not tend to cover up or obscure legislation which is in itself incongruous and has no necessary or proper connection with the rest of the act. *Brown-Forman Distillers Corp. v. McHenry*, 566 S.W.2d at 197.

Here, as with other challenges to the constitutionality of a statute, the party on the attack has the burden to show that a constitutional provision has clearly and undoubtedly been contravened. *State v. Weindorf*, 361 S.W. 2d at 809. In this situation appellants need to illustrate what the foreign or unrelated provisions are. *Id.* at 810.

On the state of the record no proof whatsoever has been adduced to support appellants' position. Nevertheless, an attempt will be made to resolve the issues on the language of the title and content of Senate Bill 305.

A case worthy of close examination here is Edwards v. Businessmen's Assurance Co., 350 Mo. 966, 168 S.W.2d 82 (1942). There, appellants complained that an insurance act entitled "An Act to revise and amend the Insurance Laws of the State of Missouri" violated Art. IV, § 28 (now Art. III, § 23) because it included a provision on suicide and its effect on insurance coverage but the title did not mention it, and because there was no existing suicide statute to amend and therefore that provision was a new law. 168 S.W.2d at 92. Appellants argued that if "new and additional laws can be enacted by incorporating them into a bill to revise and amend existing laws, then the purpose of [Art. III, § 23] . . . may be destroyed and circumvented and new and important legislation may be enacted without notice thereof to members of the General Assembly or to the people." *Edwards v. Businessmen's Assurance Co.*, 168 S.W.2d at 92. The Court acknowledged that "[t]he so-called suicide statute first appeared in an act . . . entitled 'An Act to revise and amend the Insurance Laws of the State of Missouri.'" 168 S.W.2d at 92. In rejecting appellants' claim, the *Edwards* court employed the legal principles set out above to find that the title did not violate the constitution by being overbroad or misleading.

The *Edwards* case is sufficiently analogous to the instant case to be dispositive. As in *Edwards*, the title of Senate Bill 305 gives a clear idea of the substantial purpose of the act and the challenged statute is reasonably related to the rest of the bill. The fact that the title omits particular details of the act, such as what prohibitions, etc.,

are included, is not fatal. Moreover, the fact Missouri has never before had, as law, the specific provisions of § 408.096 does not mean that the statute violates Art. III, § 23. The provisions of § 408.096 are neither incongruous, disconnected, nor without natural relation to the rest of the bill, which relates to credit transactions. Therefore, Senate Bill 305 does not contravene Mo. Const. Art. III, § 23, as asserted by appellants.

The denial by the trial court of appellants' contention on this issue must be sustained.

In our view, § 408.096 is constitutional.

The judgment of the trial court is affirmed.

Robert T. Donnelly, Chief Justice

ALL CONCUR.

APPENDIX B

408.096. Loan arrangement excess fee prohibited for certain transactions—penalty.—No person, firm or corporation shall receive or impose any fee or charge, other than one expressly provided for by statute, for arranging credit in the amount of one thousand dollars or less the proceeds of which are intended to be used by the borrower primarily for personal, family or household purposes. Any contract evidencing such excess fee or charge and any note evidencing credit so arranged is void. Any person, firm or corporation who receives or imposes a fee or charge prohibited by this section is guilty of a class B misdemeanor.

(L. 1979 S. B. 305)

APPENDIX C

***408.095. Charging interest of more than two percent per month a misdemeanor, exceptions.**—Every person or persons, company, corporation or firm, and every agent of any person, persons, company, corporation** or firm, who shall take or receive, or agree to take or receive directly or indirectly, by means of commissions of brokerage charges, or otherwise, for the forbearance or use of money or other commodities, any interest at a rate greater than two percent per month, except as permitted by the laws of this state, shall be deemed guilty of a misdemeanor. Nothing herein contained shall be construed as authorizing a higher rate of interest than is now provided by law.

(RSMo 1939 § 4813, A. L. 1974 2d Ex. Sess. S. B. 1) Prior revisions: 1929 § 4421; 1919 § 3680; 1909 § 4892 Effective 1-9-75

*Transferred; formerly 563.800

**Word "corporations" appears in original rolls.